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No. _____

Supreme Court, U.S.
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In The Supreme Court of the United States

JOSEPH LAROSA;
LAROSA'S INTERNATIONAL FUEL CO., INC.,

Petitioners,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

1. Whether the holding by the Court of Appeals for the Federal Circuit in the instant case is correct, that the service of levies by the Internal Revenue Service on "liquid" assets (such as cash in banks and marketable securities) does not reduce those liquid assets to the actual or constructive possession of the Internal Revenue Service, contrary to this Court's holding in *U.S. v. National Bank of Commerce*, 472 U.S. 713 (1985), which holds that service of a notice of levy by the Internal Revenue Service reduces the levied assets to the actual or constructive possession of the Internal Revenue Service when the levy is served.

2. Whether the holding by the Court of Appeals in the Federal Circuit in the instant case is correct in construing *U.S. v. Whiting Pools, Inc.*, 462 U.S. 198 (1983) as holding that levies by the Internal Revenue Service on "liquid" assets as opposed to nonliquid assets (such as furniture and equipment), results in a delay in crediting the proceeds of the levied liquid assets to the taxpayer's account, where the holding in *Whiting Pools*, by the express language of the opinion, and in all subsequent cases involving Internal Revenue Service levies, has been strictly limited to holding that a levy on nonliquid assets only results in a delay in crediting the levied nonliquid proceeds to the tax accounts.

3. Whether the holding by the Court of Appeals for the Federal Circuit in the instant case, that the Internal Revenue Service did not have actual or constructive possession of the liquid assets of the

Taxpayer/Appellant/Petitioner by virtue of having levied on these liquid assets, is in conflict with holdings in other Federal Circuits, notably, *In re Barlows, Inc.*, 36 B.R. 826, 53 A.F.T.R.2d 84-767, 84-1 USTC P 9233 (Bankr. D. Va. 1984), *aff d*, 767 F.2d 1098 (4th Cir. 1985) (holding that the levy on accounts receivable reduced accounts receivable to the dominion and control of the Internal Revenue Service).

4. Whether, in light of 26 U.S.C. § 6601, which provides for payment of interest on overpayments of federal income tax, Petitioners are entitled to interest on funds levied by the Internal Revenue Service, transferred to an escrow account, and held for a period in excess of five years, where the assessment, as finally determined after more than 5 years of litigation, involved was just over 14% of the original amount of levy, and the remaining 86% constituted overpayment.

RULE 14.1(b) STATEMENT

Pursuant to Supreme Court Rule 14.1(b), Petitioners LaRosa's International Fuel Co. and Joseph LaRosa state that the parties to the proceedings below appear in the caption of the case on the cover page, and that these parties are the United States Department of the Treasury, Internal Revenue Service, and LaRosa's International Fuel Co., and Joseph LaRosa.

RULE 29.6 STATEMENT

LaRosa's International Fuel Co. is a Maryland corporation and no publicly traded corporation owns or has ever owned any of its stock.

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PETITION FOR A WRIT OF CERTIORARI

CITATIONS OF OPINIONS AND ORDERS

The initial opinion of the Court of Appeals for the Federal Circuit is reported at 499 F.3d 1324 (2007). App at 2. The Court of Appeals for the Federal Circuit denied a Petition for Rehearing of the initial opinion, in an unpublished Order. App. at 1. The opinion of the United States Court of Federal Claims related to this appeal, which is not the only opinion issued by that Court in this case, but which is the only opinion involved in this Petition for Writ of Certiorari, is reported at 56 Fed. Cl. 102 (2003). App at 23.

JURISDICTION

Jurisdiction of the United States Court of Federal Claims was founded on 28 U.S.C. § 1491. Jurisdiction of the United States Court of Appeals for the Federal Circuit was founded on Section 1491, Title 28, United States Code and 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals for the Federal Circuit denied the Petition for Rehearing on November 15, 2007.

RULES AND STATUTES INVOLVED

The texts of the statutes involved in this case are set forth in the Appendix.

26 U.S.C. § 6601 provides for payment of interest on overpayments of federal income tax. At

issue in this case is whether Petitioners are entitled to a refund of interest on liquid assets levied by the Internal Revenue Service in excess of the balance of tax due.

All of the Questions Presented involve 26 U.S.C. §§ 6331, 6332, 6335, and 6337 which pertain to levies by the Internal Revenue Service on cash, and on property other than cash and cash equivalents. These statutes provide for procedural rights and requirements of notice, sale, redemption, and disposition of the surplus related to funds and property levied by the Internal Revenue Service. Also relevant is 26 U.S.C. § 6342, which provides that levies of cash or cash equivalents by the Internal Revenue Service are to be immediately applied to the tax liabilities at issue.

These statutes are relevant to the extent that they distinguish between levies on liquid assets and levies on nonliquid assets. It is Petitioner's contention that levies on liquid assets reduced these assets to the immediate actual or constructive possession of the Internal Revenue Service, unlike levies on nonliquid assets, which require that the assets be liquidated according to a set of procedures before the Internal Revenue Service obtains funds to be applied to the tax account of the former owner.

Once the levy is served, that is, by the very act of serving the levy, according to statute and case law, the levied liquid assets come into the possession of the Internal Revenue Service. Petitioners therefore contend that they are entitled to have interest credited to their tax accounts at that time,

not at some later time determined arbitrarily when the Internal Revenue Service posts the levied amounts administratively to the taxpayer's account.

Subsequent to the periods involved in this case, the so-called "Taxpayer Bill of Rights" was enacted by the United States Congress. That bill contains procedural safeguards which delay the possessory interests of the Internal Revenue Service for a 21 day period after service of a notice of levy. This statute, contained in 26 U.S.C. § 6332, is not relevant to the instant case because it took effect after the years at issue here. However, the precedential value of this case applies to levies served after the effective date of this statute as well, because taxpayers should be entitled to credit for levied funds after the expiration of the statutory 21 day period, even if these funds are not immediately turned over to the Internal Revenue Service.

STATEMENT OF THE CASE

A. The Relevant Facts

This is a tax refund case commenced by the Plaintiffs LaRosa's International Fuel Co., Inc. and one of its shareholders, Joseph LaRosa, to recover interest on funds levied by the Internal Revenue Service pursuant to a jeopardy assessment. These Plaintiffs are the Certiorari Petitioners in this case. Liquid assets of both of the Petitioners were levied, and interest on the levied funds was not ever credited to the tax accounts of either Petitioner. It is the effect of these levy notices on the liquid assets, only, of the Petitioners which is at issue in this case.

In response to the jeopardy assessment, the Plaintiffs filed a timely suit in the United States District Court to overturn the jeopardy assessment. The District Court passed an order essentially "freezing" the assets of the Petitioners until resolution of the jeopardy assessment case. By way of resolving the District Court action, the Petitioners and the Internal Revenue Service entered into an agreement to escrow the funds subject to the levies. The total amount escrowed was approximately $20,000,000 of which approximately $10,000,000 consisted of liquid assets. The actual values of these escrow was never established in the proceedings below because of the procedural posture of the case, and the value of the liquid assets is an issue to be determined upon remand.

The escrow agreement provided that the parties would each appoint an escrow agent, and that each escrow agent could not act voluntarily without consent of the other. The escrowed funds could be disbursed by mutual agreement of the parties, or by order of a court entering final judgment on tax assessments for 1979 – 1983, inclusive, or if the court determined that the jeopardy assessment was not valid.

The escrow agreement was funded when the Internal Revenue Service transferred the levy proceeds to the escrow during the pendency of the challenge by the Petitioners to the jeopardy assessment.

The Petitioners' tax liabilities were ultimately resolved by United States Tax Court proceedings.

As a result the levies issued by the Internal Revenue Service pursuant to the jeopardy assessment remained in force, as did the escrow agreement, until May of 1991, a period in excess of five years.

The Petitioners were permitted receive only limited distributions from the escrow account to pay certain living expenses, such as tuition for their children and legal fees. These sums were disbursed only after the Internal Revenue Service agreed to the disbursements. The factual issue of how much was disbursed to the Petitioners remains to be determined upon remand.

The United States Tax Court stipulation provided that the Petitioners and others were liable for a total of $3,624,584, or just over 14% of the original $20 million assessment. The $3.6 million consisted of tax, penalty and interest, computed after netting offsets from years in which Petitioner LaRosa's International had overpaid tax.

This agreed-upon assessment of tax, penalty and interest was paid by the Petitioners and the other LaRosa family members, not parties to this case, on May 1, 1991. The funds used to pay this stipulated assessment were separate funds which were not held in the escrow account or subject to levy.

The Tax Court stipulation reserves to the Petitioners the right to make a claim against the Internal Revenue Service to recover interest on the levied funds. Petitioners also have the separately established right to demand interest on funds seized

by the Internal Revenue Service, pursuant to the statutes governing payment of interest on overpayments of tax.

After the U.S. Tax Court entered the stipulated order approving a settlement of the tax assessment, and the assessment was paid, the escrow account was dissolved and the Internal Revenue Service later released the levies. Pursuant to the reservation of their rights to seek interest on the escrowed funds, the Petitioners filed a timely refund claim with the Internal Revenue Service, which was denied. The Petitioners then timely commenced the instant case to recover interest on the escrowed funds.

Petitioners claim that they are entitled to recover this interest under the same rules as apply to overpayments of tax. The United States claims that the Government never had dominion and control over the liquid assets and so the Petitioners are not entitled to interest. Petitioners' position is that when the Internal Revenue Service served levy notices on the custodians of Petitioners' liquid assets, these levies reduced the liquid assets to the actual or constructive possession of the Government, and so the Petitioners are entitled to credit interest on the liquid assets from the dates of the levies. To the extent that this interest credit results in an overpayment, the Petitioners are entitled to a refund. The transfer of the levied funds to the escrow by the Internal Revenue Service does not change this result.

The first levy is dated December 3, 1985, and so levies were outstanding on the liquid assets totaling, as Petitioner contends, $10 million at issue here for a period of five years and four and one-half months. The interest, including the compound interest accrued from December 3, 1985 to the present day is approximately $7 million. The exact amounts are unresolved factual issues to be determined upon remand.

B. Proceedings in the United States Court of Federal Claims

All of the relevant facts were stipulated and the proceedings below consisted of a ruling on cross motions for summary judgment.

The District Court, relying on *Rosenman v. U.S.*, 323 U.S. 568 (1945), held that the Internal Revenue Service never obtained possession, either actual or constructive, of the Petitioners' liquid assets, even though these assets were held by their custodians subject to service of a levy, and later transferred to an escrow account by the Internal Revenue Service.

In the *Rosenman* case, an estate was faced with a requirement that it pay estate tax within one year of the date of death of the decedent. The *Rosenman* estate was not in a position to compute the tax liability, so it estimated an amount and sent this estimated amount to the Internal Revenue Service as a deposit toward payment of any amount which may be found to be due. The *Rosenman* estate later filed the estate tax return and showed a tax

liability of about 25% of the amount originally paid in. This return was later audited by the Internal Revenue Service and an additional tax due was assessed on audit at an amount close to the amount originally paid in. The estate contested the higher tax liability and filed a claim for refund of a portion of the initial deposit.

The relevant statute provides that claims for refund must be filed within 2 years of the date of payment of tax, or the refund is time-barred. In *Rosenman*, the court held that the 2 year period begins to run only when the initial deposit of funds is applied to payment of the tax shown to be due after the subsequent assessment, and so the court allowed the refund claim to proceed because the deposit was applied to the tax assessment within the two year period, even though the initial deposit was made with the Internal Revenue Service more than 2 years before the claim.

Analogizing between the holding in *Rosenman* and the facts of the instant case, the Court of Federal Claims held that, like the taxpayer in *Rosenman*, the Petitioners' levied funds should be treated in the nature of the deposit, and so the

Petitioners would not be entitled to interest on these funds[1].

The Petitioners argued that *Rosenman* did not apply to the instant case because the remittance in *Rosenman* was a voluntary payment. In the instant case, the funds were distrained by the Internal Revenue Service and they were not voluntary payments. Moreover, at the time of the distraint in the instant case, there was an assessed balance of tax against the Petitioners. In *Rosenman*, the payment was made before the tax assessment came into being. The cases which have decided these issues, especially since *U.S. v. National Bank of Commerce*, 472 U.S. 713 (1985), have held that service of a levy notice by the Internal Revenue Service on the custodian of liquid assets reduces those assets to the actual or constructive possession of the Government. It follows logically, and under the statute providing for interest on tax overpayments, that once funds may be characterized as being in the actual or constructive possession of the Government, the taxpayer is entitled to a credit for the interest on the funds.

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[1] After the decision of the United States Court of Federal Claims in the instant case, Judge Braden issued the opinion in *Joan Huskins, Personal Representative of the Estate of Phillip Goldstein*, 75 Fed. Cl. 659, 99 A.F.T.R.2d 2007-1728, 2007-1 USTC P 60,538 (2007). That case sets forth factors distinguishing *Rosenman*. These factors, if applied to the instant case, would result in rejection of the rationale from *Rosenman*.

Although the funds in the instant case were later transferred into an escrow by the Internal Revenue Service, this transfer itself was an exercise of dominion and control over the funds by the Internal Revenue Service. Petitioners contend that the situation in *Rosenman* is factually and legally inapplicable to the situation presented by the instant case.

The District Court denied Petitioners' claims and the Petitioners filed a timely appeal to the Court of Appeals for the Federal Circuit.

C. Proceedings in the Court of Appeals for the Federal Circuit

The Appellate Panel in the Court of Appeals for the Federal Circuit upheld the decision of the Court of Federal Claims. The Panel relied on the case of *U.S. v. Whiting Pools, Inc.*, 462 U.S. 198

(1983)[2], finding that service of a levy notice by the Internal Revenue Service on custodians of liquid assets does not reduce the levied asset to the actual or constructive possession of the Internal Revenue Service. This being the case, according to the logic of the Appellate Panel, the service of the levies on the Petitioners' liquid assets did not give rise to a claim for interest on the overpayment of the tax that was the subject of the levies.

Petitioners filed a Motion for Panel Reconsideration, pointing out that *U.S. v. Whiting Pools, Inc.* expressly applies only to levies on non-liquid assets. There are two reasons for this distinction. First, the language of the statutes differentiates between levies on liquid and nonliquid assets. Second, common sense dictates that

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[2] The parties in the courts below consistently analogized to bankruptcy turnover actions, the theory being that if a bankruptcy court would order assets turned over to the debtor-in-possession bankruptcy estate, after these assets had originally been distrained against the debtor-in-possession by the Internal Revenue Service, this indicates that the Internal Revenue Service did not have actual or constructive possession of the assets so as to entitle the taxpayer to interest. Conversely, if the bankruptcy court refused to order turnover of the assets, this indicates that the Internal Revenue Service had perfected its title to the seizure of the assets so as to entitle the taxpayer to interest credit on the seized assets. Turnover of assets in bankruptcy is governed by 11 U.S.C. §§ 542 and 543.

nonliquid assets must be sold before the cash can be applied to the tax debt. A levy on a liquid asset does not have a similar restriction.

The Appellate Panel also relied on the case of *Stead v. U.S.*, 419 F.3d 944 (9th Cir. 2005). In *Stead*, the Court held that the Internal Revenue Service does not take title to levied assets until it "reaps the proceeds of a tax sale or otherwise collects on the property of the taxpayer." *Stead* applies this rationale also to cash and cash equivalents.

In the Motion for Panel Reconsideration, the Petitioners pointed out to the Court that *Stead* was decided after the effective date of the procedural safeguards enacted by the Taxpayer Bill of Rights, specifically, 26 U.S.C. § 6332(c). That section of the Tax Code provides a 21 day "hold" between the service of a levy notice and the turnover of the liquid asset proceeds to the Internal Revenue Service. It was this 21 day delay in receipt of the funds by the Internal Revenue Service that justified the holding in *Stead*. Until the lapse of the 21 day period, the levied taxpayer could file a variety of administrative proceedings to release or modify the levy. Accordingly, levies served after the effective date of the Taxpayer Bill of Rights does not immediately vest the levied liquid assets in the actual or constructive possession of the Internal Revenue Service.

It is significant that 21 day hold did not apply to the levies in the instant case, because the "hold" did not become law until July 1, 1989, or about 3 1/2 years after the levies were served on Petitioners'

liquid assets in December of 1985 and January 1986. Prior to 1989, service of a levy notice on liquid assets vested these assets in the possession of the Internal Revenue Service immediately without any intervening 21-day holding period. *U.S. v. National Bank of Commerce*, 472 U.S. 713 (1985).

The Appellate Panel also held that the escrow agreement, into which the Internal Revenue Service deposited the levied assets after the service of the levy notices, brings *Rosenman* into play. The Panel held that the Internal Revenue Service did not obtain dominion over the funds because the funds were placed in the escrow.

Petitioners argued that the escrow does not affect their interest claim for two reasons. First, the escrow was created by the Internal Revenue Service and the Internal Revenue Service deposited funds from the levies into the escrow. Second, by virtue of the service of the levy notices on the custodians of Petitioners' liquid assets, the Internal Revenue Service came into the actual or constructive possession of these funds upon service of the levies. Later disposition of levied assets by the Internal Revenue Service does not exonerate those assets from payment of interest. Finally, all prior cases allow the taxpayer to attain credit for interest in the circumstances.

REASONS FOR GRANTING THE PETITION

A. The Appellate Panel Decision is Directly Contrary to Established Supreme Court Precedent.

The primary issue in the instant case is whether, when the Internal Revenue Service levies on the liquid assets of the Petitioners, this act of serving the levy notice gave the Petitioners the right to claim interest on the levied funds. In *U.S. v. National Bank of Commerce*, 472 U.S. 713 (1985), this Court held that service of a levy notice on the custodian of property by the Internal Revenue Service results in the Internal Revenue Service obtaining actual and/or constructive possession of the levied property. Once the Internal Revenue Service is in actual or constructive receipt of the property, the taxpayer is entitled to the benefit of having the value of the levied property applied against the balance of the tax assessment. If this receipt of the taxpayers property results in an overpayment, the taxpayer is entitled to interest.

The Internal Revenue Service should not be allowed to avoid paying or crediting interest on levied funds if there is a delay in applying those funds to a taxpayer's tax account. There is no court case, statute, or other precedent which would justify the failure of the Internal Revenue Service to pay or credit interest under the circumstances.

National Bank of Commerce squarely addresses the issues involved in Petitioners' claim. This case predates the procedural delays enacted by

the Taxpayer Bill of Rights. However, consideration of this issue by the United States Supreme Court at this time is as relevant to the universe of taxpayers today as it was before the Taxpayer Bill of Rights, because taxpayers should be entitled to have interest credited to their tax accounts after the lapse of the 21 day period following service of the levy.

26 U.S.C. § 6601 provides for payment of interest on overpayments of federal income tax, and the right interest under this statute begins when the tax is paid. It is difficult to understand why the service of a levy notice on a custodian of liquid assets should not be considered a payment of tax, both in the instant case, on the date when the notice is served, or on the 22nd day after service of the levy, under the law which applies to levy served after July of 1989. In the instant case, the tax due was not finally determined until after a delay of more than 5 years. Moreover, it was determined that the Petitioners had overpaid their taxes, by virtue of the levies, by nearly a factor of seven.

If the decision of the Court of Appeals for the Federal Circuit in the instant case stands, it stands in direct contradiction to the decision of this Court in *U.S. v. National Bank of Commerce*.

The federal courts have consistently distinguished between levies on liquid and nonliquid assets, particularly in the bankruptcy context. As the instant case involves a claim for interest only the value of the liquid assets that were subject to the levies, these cases are particularly instructive.

In the case of *U.S. v. Whiting Pools, Inc.*, 462 U.S. 198 (1983), this Court allowed a bankruptcy debtor-in-possession under Chapter 11 to secure the turnover of nonliquid assets which had been levied by the Internal Revenue Service within 90 days prior to the bankruptcy petition date, as allowed by bankruptcy law. The rationale of *Whiting Pools* is that a levy by the Internal Revenue Service on nonliquid assets does not ripen into actual and/or constructive possession until the nonliquid assets are liquidated by sale or other disposition. Since the nonliquid assets would not have been applied to the tax liability until the liquidation process was complete, this Court held that the debtor could obtain a turnover of these as yet unliquidated assets.

By way of contrast, bankruptcy courts applying *Whiting Pools* have not permitted debtors-in-possession to obtain a turnover of liquid assets which have been levied by the Internal Revenue Service prior to the filing of the bankruptcy petition, because a levy on liquid assets divests the taxpayer and vests the funds in the Internal Revenue Service.

For example, in *Ruggeri Electrical Contracting v. U.S.*, 185 BR 750; 80 AFTR2d 97-8033 (E.D. MI, 1995), the court, in a bankruptcy turnover action under the same fact pattern as *Whiting Pools*, allowed the Internal Revenue Service to retain proceeds of liquid assets, consisting of a bank account levied 20 days prior to the commencement of bankruptcy. (Incidentally, the reason this Court did not wait for the 21 days to expire under the Taxpayer Bill of Rights is because the bankruptcy debtor did not articulate a rationale for avoiding the

levy procedurally during the 21 day period, and so the court decided that the 21 days need not expire.)

The rationale of the court in *Ruggeri* is that there is a significant distinction between levied property which is liquid and that property which does not become liquid until after it is sold by the Internal Revenue Service. According to the court, the levy in *Ruggeri* transferred the levied cash to the actual or constructive possession of the Internal Revenue Service upon service of the levy notice. This transfer to the Internal Revenue Service immunized the cash from being turned over to the debtor-in-possession, from which the cash had been originally distrained.

Accordingly, the taxpayer in *Ruggeri* would be entitled to interest from the Internal Revenue Service on the levied funds from the date of the levy.

B. The Fact that Funds were Escrowed is Not Determinative.

The fact that the Internal Revenue Service agreed to escrow funds after they had been levied upon does not change the result. Courts which have considered this issue have uniformly held that establishing an escrow account with funds which have been levied by the Internal Revenue Service does not change the legal status of these funds *vis a vis* payment of taxes from the escrow.

In a case which is directly on point with the facts in the instant case, *Stone v. Commissioner*, Memorandum Sur Order, U.S. Tax Court Docket No.

5311-72 (March 30, 1987), where the court addressed two situations where there was a delay between service of a levy notice by the Internal Revenue Service and the receipt of the levied funds by the Internal Revenue Service. In the first instance, the issue was whether interest accruing on funds held in a bank account for a one-year period following levies served on that bank account accrues to the benefit of the taxpayer. The *Stone* court also considered a situation where the Internal Revenue Service levied escrowed funds and then instructed the escrow custodian to hold the funds in escrow rather than turning the escrowed funds over to the Internal Revenue Service pursuant to the levy notice. A copy of the *Stone* Memorandum Sur Order is attached to this Petition at App. 29.

In both instances, the Tax Court ruled that the taxpayer was entitled to credit for interest as provided by 26 U.S.C. § 6601 on the levied funds, even though those funds were held in escrow and not turned over to the Internal Revenue Service for a period of about a year.

In *Stone*, as in the instant case, the Internal Revenue Service proceeded by jeopardy assessment against the taxpayer. In *Stone*, the court ruled that the interest stopped running on the portion of the jeopardy assessment to the extent of the funds tied up as a result of the service of the levy notices for the period of about a year while the funds remained on deposit, as well as those funds remaining in escrow, because the levies gave the Internal Revenue Service the immediate and unrestricted right to the funds. The Internal Revenue Service has this right even

though these funds were not turned over to the Internal Revenue Service until one year later.

It was the act of serving the levy which gave rise to a viable claim on behalf of Stone for the crediting of interest to the tax account. Due to the service of the levy notice, and the legal effect of that notice transferring actual and/or constructive possession of the levied funds to the Internal Revenue Service, the funds held in the bank and an escrow were treated as having been credited to a tax liability arising under a jeopardy assessment, from the date of service of the notice of levy.

In *Stone*, the taxpayer got credit for interest on the levied funds even though these funds were held by the banks pending the outcome of the challenge to the jeopardy assessment, and not turned over to the Internal Revenue Service until then. The taxpayer's entitlement to interest was not dependent on turning over the escrowed funds to the Internal Revenue Service, once the funds had been attached by way of service of the levy.

The Appellate Panel attempts to distinguish *Stone* on the grounds that the Internal Revenue Service in *Stone* could have demanded the surrender of the levied funds at any time. However, in the instant case, as in *Stone*, the Internal Revenue Service had complete dominion and control over the Petitioners' levied funds when it served the levies. The Internal Revenue Service decided, in its discretion, and in face of the fact that the jeopardy assessment against the Petitioners had been challenged in the United States District Court, to

establish the escrow account. There is no issue of surrender of funds in the instant case because the Internal Revenue Service had possession of the funds upon service of the levy notices, and then the Internal Revenue Service agreed to a disposition of the funds.

Like the taxpayers in *Stone*, the Petitioners in the instant case preserved their rights to challenge the jeopardy assessment, and so the assessment did not become final until more than five years later. This challenge, which resulted in the elimination of almost 86% of the balance of the Petitioners' original assessment, should be irrelevant to the issue of whether the Petitioners are entitled to have interest credited to their tax account.

The Appellate Panel also attempts to distinguish *Stone* on the grounds that the Internal Revenue Service in that case stipulated that the fact that interest accrued inside of the escrow on escrowed funds stops the running of the interest on the jeopardy assessment during the pendency of the escrow. This stipulation would seem rather to be in the nature of an admission by the Internal Revenue Service that interest on escrowed tax levies is applied against interest that runs on jeopardy assessments in general.

The fact that the Internal Revenue Service stipulated in *Stone* has no bearing on the instant case. The United States Tax Court stipulation, signed by Petitioners in the instant case as well as the Internal Revenue Service, and entered as a final order by the Tax Court, specifies that the Petitioners

may file a claim to recover interest on the levied funds.

The courts have considered a situation in which a taxpayer made a claim for interest on funds which were held in an interest-bearing escrow account, where the escrow account was established for the payment of the tax debt. In the case of *Berger et al. Ex'r of the Estate of Goldfarb v. U.S.*, 85-1 USTC ¶ 13,618; 56 AFTR 2d 85-6505 (S.D. NY 1985), the court held in favor of a taxpayer who, like the Appellant in the instant case, became entitled to a refund resulting from the fact that funds for payment of the taxpayer's taxes were held in an escrow account.

The *Estate of Goldfarb* taxpayer was entitled to collect interest from the Internal Revenue Service based on the difference between the interest earned by the treasury bonds held in the escrow account and the interest which would have been credited to the taxpayer under the statutes governing interest payments on the refund of a tax overpayment. This is exactly the relief which Petitioners are seeking.

The *Estate of Goldfarb* case also answers the objection that it is somehow not equitable for the Petitioners in this case to collect interest on the escrow account and then to collect interest again from the Internal Revenue Service. The law on this point is that interest earned on the escrow account offsets interest payable by the Internal Revenue Service, and so there is no double payment.

C. Conflict in the Circuits

In *In re Barlows, Inc.*, 36 B.R. 826, 53 A.F.T.R.2d 84-767, 84-1 USTC P 9233 (Bankr. D. Va. 1984), *aff'd*, 767 F.2d 1098 (4th Cir. 1985), the Fourth Circuit held that the service of a levy on liquid assets such as accounts receivable, without more, reduces the levied asset to the dominion and control of the Internal Revenue Service. A levied liquid asset such as an account receivable would not be subject to a bankruptcy turnover action once the levy notice had been served on the asset's custodian, because the law is that the levy vests the asset in the Internal Revenue Service.

The Appellant Panel decision in the instant case holds that the service of a levy on custodians of liquid assets such as cash and marketable securities is irrelevant if the Internal Revenue Service later escrows the levied funds. This holding is in conflict with *In Re Barlows, Inc.* and it would represent a reversal of a significant body of law related to the effect of a levy of assets on a taxpayer's rights, which has been in existence for decades.

D. Petitioners' Entitlement to Interest

The Petitioners in this case had their assets seized by the Internal Revenue Service and held for 5 1/2 years. When the tax balance due was finally determined, it was established that the tax ultimately due was only somewhat more than 14% of the amount of funds which had originally been levied. Then, against all established precedent, the

Petitioners were denied the right to recover interest on these levied funds.

The Internal Revenue Service sends out numerous levy notices every year and makes a significant number of jeopardy assessments against a large number of diverse taxpayers. The right to taxpayers to secure interest on the funds tied up in the proceedings is guaranteed by the Constitution of the United States, which prevents taking property without due process of law. Taxpayers are also protected by the statutes enacted by Congress to permit taxpayers credit for interest when they overpay their taxes.

CONCLUSION

It is respectfully submitted that certiorari should be granted in this case because the decision of the Appellate Panel below is contrary to long-established precedent, including decisions of the United States Supreme Court, and also in conflict with other decisions of Federal Courts of Appeal.

A definitive ruling is needed to preserve the rights of all taxpayers to have interest properly credited to their accounts when their liquid assets are levied by the Internal Revenue Service. It is

therefore respectfully submitted that this Court should consider the instant case.

Respectfully submitted,

Thomas F. DeCaro, Jr.
Attorney for LaRosa's
International Fuel Co. and
Joseph LaRosa
14406 Old Mill Rd. #201
Upper Marlboro, MD 20772
301-464-1400

NOTE: This order is nonprececlential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

Before Rader, Circuit Judge, Schall, Circuit Judge, and Linn, Circuit Judge.

A petition for rehearing having been filed by the Appellants,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED,

The mandate of the court will issue on November 26,2007.

FOR THE COURT,

/s/

Jan Horbaly
Clerk

Dated: 11/15/2007
cc: Thomas F. DeCaro, Jr.
Ellen Page DelSole

LAROSA'S INTL FUEL CO V US, 2007-5017
(CFC - 97-CV-834)

Westlaw.
499 F.3d 1324
499 F.3d 1324, 100 A.F.T.R.2d 2007-6042,
2007-2 USTC P 50,657
(Cite as: 499 F.3d 1324)

LaRosa's Intern. Fuel Co., Inc. v. U.S.
C.A.Fed.2007.

United States Court of Appeals, Federal Circuit.
LAROSA'S INTERNATIONAL FUEL CO., INC. and Joseph **LaRosa,** Plaintiffs-Appellants,
v.
UNITED STATES, Defendant-Appellee. No. **2007-5017.**

Sept. 18, 2007.
Rehearing Denied Nov. 15, 2007.

Background: Taxpayers, a supplier of coal to utility companies and a company shareholder, brought action against government seeking recovery of interest they paid on taxes for the period while the funds belonging to them were subject to Internal Revenue Service ("IRS") levies and were held in an escrow account established by taxpayers and the IRS. The United States Court of Federal Claims, Thomas C. Wheeler, J., 56 Fed.Cl. 102, granted summary judgment in favor of government. Thereafter, the Court, 73 Fed.Cl. 625, granted summary judgment in favor of taxpayers on government's counterclaim for additional interest on unpaid taxes. Taxpayers appealed.

Holdings: The Court of Appeals, Schall, Circuit Judge, held that:

(1) IRS levy of assets did not constitute a payment, and

(2) placement of funds in escrow account did not constitute a payment.

Affirmed.

West Headnotes

[1] Internal Revenue 220 €=4765

220 Internal Revenue
220XXIII Liens

220k4765 k. In General. Most Cited Cases Liens the Internal Revenue Service (IRS) may put on property do not transfer ownership of the property to the IRS. 26 U.S.C.A. §§ 6331,6332(a).

[2] Internal Revenue 220 €=4765

220 Internal Revenue
220XXHI Liens
220k4765 k. In General. Most Cited Cases

Internal Revenue 220 €=>4828.1

220 Internal Revenue
220XXIV Payment
220k4828 Mode and Medium of Payment
220k4828.1 k. In General. Most Cited Cases

Internal Revenue 220 €=4831

220 Internal Revenue
220XXIV Payment
220k4831 k. Amount Due, Interest and Fees. Most Cited Cases

In levying the assets of taxpayers, the Internal Revenue Service (IRS) did not possess full dominion and control over the levied assets, and thus the levy did not constitute constructive possession of the funds by

the IRS, so as to constitute a payment of taxpayers' deficiencies and stop the accrual of interest; lien provided IRS with nothing more than a secured interest in taxpayers' property. 26 U.S.C.A. §§6331, 6332, 6601(a).

13] Internal Revenue 220 €=4828.1

220 Internal Revenue 220XXIV Payment
220k4828 Mode and Medium of Payment
220k4828.1 k. In General. Most Cited Cases

Internal Revenue 220 €=4831
220 Internal Revenue 220XXIV Payment

220k4831 k. Amount Due, Interest and Fees. Most Cited Cases

Placement of taxpayers' funds in an escrow account did not constitute the payment of their tax liabilities to the Internal Revenue Service (IRS) so as to stop the accrual of interest upon their deficiency; provisions of the escrow agreement indicated the mutual intent of the contracting parties to avoid the seizure and sale of taxpayers' property, IRS could not apply escrowed funds to taxpayers' liabilities as a payment without the consent of the escrow agents or until a court had made a final determination as to those liabilities, and escrow agreement expressly stated that the agreement was not to be considered payment of taxpayers' liability. 26 U.S.C.A. § 6601 (a).

*1325 Thomas F. DeCaro, Jr., DeCaro & Howell, P.C, of Upper Marlboro, MD, argued for plaintiffs-appellants. Ellen Page DelSole, Attorney, Tax Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With her on the brief was Eileen J. O'Connor, Assistant Attorney General.

Before RADER, SCHALL, and LINN, Circuit Judges. SCHALL, Circuit Judge.

LaRosa's International Fuel Co., Inc., ("**LaRosa** Fuel") and Joseph **LaRosa** (together, "taxpayers") appeal the final judgment of the United States Court of Federal Claims dismissing their consolidated tax refund suits. ***LaRosa's*** *Int'l Fuel Co. v. United States,* Nos. 97-834T, 97-835T (Oct. 30, 2006). In their suits, taxpayers sought to recover interest they paid on unpaid taxes for the period while funds belonging to them were subject to Internal Revenue Service ("IRS") levies and were held in an escrow account established by taxpayers and the IRS. On April 3, 2003, the court granted summary judgment in favor of the United States on taxpayers' refund claims. ***LaRosa's*** *Int'l Fuel Co. v. United States,* 56 Fed.Cl. 102, 104 (Apr. 3, 2003) ***(LaRosa I)***. The court did so after holding that taxpayers were not entitled to recover the interest they had paid because the levies and the placement of their funds in escrow did not constitute the payment of their unpaid taxes, so as to stop the accrual of underpayment interest under section 6601(a) of the Internal Revenue Code ("I.R.C." or "Code"), 26 U.S.C. Subsequently, on October 27, 2006, the court granted summary judgment in favor of taxpayers on

the government's counterclaim for additional interest on unpaid taxes. ***LaRosa's** Int'l Fuel Co.* v. *United States,* 73 Fed.Cl. 625, 626-27 (Oct. 27, 2006) ***(LaRosa** II).* Shortly thereafter, the ***1326** court entered final judgment dismissing taxpayers' complaints. Because we find no error in the decision of the Court of Federal Claims in **LaRosa I,** we affirm. ™

FN1. The government has not appealed the decision of the Court of Federal Claims in ***LaRosa** II.*

BACKGROUND

I.

LaRosa Fuel is a Maryland corporation that supplies coal to utility companies. Joseph **LaRosa** is a shareholder of the corporation; his brother, Dominick **LaRosa,** is the president. On December 3, 1985, the IRS made jeopardy assessments against taxpayers and Dominick **LaRosa,** totaling $21,208,383 in taxes, penalties, and interest for the tax years 1981 through 1983. Of that amount, almost $12 million was assessed against **LaRosa** Fuel, almost $800,000 was assessed against Joseph **LaRosa,** ***LaRosa** I,* 56 Fed.Cl. at 103, and almost $8.5 million was assessed against Dominick **LaRosa.** From December 3, 1985 to December 11, 1985, pursuant to I.R.C. § 6331, the IRS served levy notices on financial institutions holding liquid assets and other property of taxpayers and Dominick **LaRosa.**

In December of 1985, $169,955 was remitted to the IRS, which was applied to the assessment against Joseph **LaRosa.** In December of 1985 and January of 1986, a further $114,098 was remitted to) the IRS, which was applied to the assessment against **LaRosa** Fuel. On January 16, 1986, taxpayers and Dominick **LaRosa** entered into an escrow agreement with the IRS. Pursuant to the agreement, the liquid assets of taxpayers and Dominick **LaRosa** were placed in an escrow account pending final resolution of their tax liabilities. ***LaRosa*** *I,* 56 Fed.Cl. at 103.

Following the execution of the escrow agreement, the IRS issued notices of deficiencies to taxpayers and Dominick **LaRosa,** reflecting the tax liabilities that were the subject of the jeopardy assessments, hi response, taxpayers and Dominick **LaRosa** filed petitions in the United States Tax Court contesting the deficiency determinations. ***LaRosa's*** *Int'l Fuel Co. v. Comm'r,* No. 6173-86 (T.C.); ***LaRosa*** v. *Comm'r,* No. 6172-86 (T.C.). Subsequently, in March of 1991, taxpayers and Dominick **LaRosa** resolved the Tax Court litigation by settling their tax liabilities-including taxes, penalties, and underpayment interest-in three stipulated decisions. Pertinent to this case, the stipulated decision in **LaRosa** Fuel's case determined that it was liable for deficiencies and additions to taxes totaling $316,324, while the stipulated decision in Joseph **LaRosa's** case determined that he was liable for deficiencies and additions to taxes totaling $2,331,566. Taxpayers and Dominick **LaRosa** paid the stipulated amounts out of funds separate from those in the escrow account. The three stipulations

expressly reserved for taxpayers and Dominick **LaRosa** the right "to pursue an action in the appropriate federal court with respect to the interest claimed to be due by the IRS on the respective deficiencies." ***LaRosa*** *II,* 73 FedCl. at 626. Shortly thereafter, the levies and escrowed funds were released.

II.

In April of 1993, exercising their reserved rights, taxpayers and Dominick **LaRosa** filed claims with the IRS for the refund of interest. *Id* at 627. In their claims, they asserted that they had made excessive interest payments on their former tax liabilities because the IRS had assessed interest after the levies and while their assets remained in escrow. *132T'***LaRosa** *I,* 56 FedCl. at 103. After the IRS denied the claims, taxpayers filed suit in the Court of Federal Claims seeking a refund of interest payments.™[2] hi their suits, they argued that from December of 1985 (when the IRS made jeopardy assessments and serviced levy notices), the IRS had actual or constructive possession of their assets. *Id* In view of that possession, taxpayers contended, the IRS should have credited the full value of the assets against their tax assessments, which would have stopped the accrual of underpayment interest against them under I.R.C. § 6601 (a). *Id* Therefore, taxpayers sought a refund of the underpayment interest the government had charged them and which they had paid as part of the stipulated Tax Court settlement. *Id* at 103-04.

FN2. By order dated March 10, 2003, the cases of **LaRosa** Fuel and Joseph **LaRosa** were consolidated before the Court of Federal Claims. ***LaRosa*** *II,* 73 Fed.Cl. at 627.

In due course, after stipulating to the pertinent facts, the parties cross-moved for summary judgment on the issue of underpayment interest. *Id.* at 104. hi then- motion, taxpayers urged that the seizure of their assets by levy and the subsequent placement of their funds in escrow amounted to payment of their tax deficiencies. *Id.* For its part, the government argued that a tax is paid when funds are actually applied to satisfy a tax assessment. *Id.* Ruling on the cross-motions, the Court of Federal Claims held that the IRS's levy against taxpayers' assets and the placement of their funds in the escrow account did not constitute payment of their tax liability. In its decision, the court relied on the Supreme Court's decision in *Rosenman v. United States,* 323 U.S. 658, 65 S.Ct. 536, 89 L.Ed. 535 (1945), which the Court of Federal Claims read as standing for the proposition that, in order for a tax liability to be deemed paid, funds actually must be applied to the tax liability. ***LaRosa*** *I,* 56 Fed.Cl. at 104 (citing *Rosenman,* 323 U.S. at 662, 65 S.Ct. 536). The court stated that "it is not enough to place funds into a 'suspense' account, or escrow, which merely functions as a surety against the future payment of said liability." *Id.* The court therefore granted summary judgment for the government on the underpayment interest issue.™[3] *Id.* As noted above, the court subsequently granted summary judgment for taxpayers on the government's counterclaim for additional interest on

unpaid taxes, a ruling that the government has not appealed. *See LaRosa II,* 73 Fed.Cl. at 631.

> FN3. Dominick LaRosa independently filed suit for a refund of underpayment interest. He did so by way of a counterclaim in the government's suit against him for the recovery of an erroneous tax refund in federal district court in Maryland. The court rejected his claim. *United States* v. *LaRosa,* 993 F.Supp. 907 (D.Md.1997), *qffd\55* F.3d 562 (4th Cir.1998) (unpublished table decision).

After judgment was entered dismissing their complaints, taxpayers appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

I.

Pursuant to I.R.C. § 6601, interest on a tax underpayment runs from the date the tax was due until the date the tax is paid. *1328 Taxpayers contend that their taxes should be deemed to have been fully paid when the IRS levied on their assets in December of 1985. According to taxpayers, after the attachment of the levy, "the IRS had full dominion and control over the levied assets." Taxpayers argue that the IRS was not required to escrow their funds, and that the IRS's control over their funds was maintained through the transfer to the escrow account and while the funds were in the account. Consequently, taxpayers urge, because there were no unpaid taxes once the IRS levied on their assets and

while their funds were in escrow, underpayment interest stopped accruing, and they are entitled to a refund of the interest they paid from the date of the levies until the date of the payments that settled the Tax Court litigation.

> FN4. Subsection 6601(a) of the I.R.C. states in full:

If any amount of tax imposed by this title (whether required to be shown on a return, or to be paid by stamp or by some other method) is not paid on or before the last date prescribed for payment, interest on such amount at the underpayment rate established under section 6621 shall be paid for the period from such last date to the date paid.

The government responds that underpayment interest did not stop accruing at the time of the levies on taxpayers' assets because the IRS did not realize funds from the levies and did not apply taxpayers' funds to satisfy the jeopardy assessments made against taxpayers. The government further argues that this continued to be the case while taxpayers' funds were being held in escrow. Thus, the government argues, the Court of Federal Claims did not err in granting summary judgment in its favor.

The parties' contentions squarely frame the issue before us. The issue is whether taxpayers are entitled to a refund of underpayment interest on the theory that, once the levies on their assets were made and the escrow account was created, the IRS had actual or constructive possession of their assets, thereby constituting payment of their tax liabilities

so as to cause underpayment interest to stop accruing. This is an issue of law. We therefore review the decision of the Court of Federal Claims without deference. *Mass. Bay Transp. Auth.* v. *United States,* 254 F.3d 1367, 1372 (Fed.Cir.2001).

II.

For the following reasons, we hold that neither the levies nor the depositing of taxpayers' funds into the escrow account constituted payment of taxpayers' tax liabilities, so as to stop the accrual of underpayment interest under I.R.C. § 6601 (a).

A.

I.R.C. § 6331 authorizes the IRS to "levy" upon the property of a taxpayer. That property can be "real or personal, tangible or intangible." I.R.C. § 6331(b). Section 6331 explains that, as used in the Code, the term "levy" includes "the power of distraint and seizure by any means." I.R.C. § 6331(b). Distraint, also termed distress, is "[t]he seizure of another's property to secure the performance of a duty." *Black's Law Dictionary* (2004). "Distress ... [is] subject, however, to the right of the owner to have the chattel returned to him [up]on the injury being redressed, or the duty performed, or the demand satisfied or [up]on security being given so to do." *Id.* (quoting F.A. Enever, *History of the Law of Distress* 7-8 (1931) (second and third alterations in original)). I.R.C. § 6332(a) requires the possessor of the property subject to the levy to surrender it to the IRS, while section 6335 allows the IRS to sell the seized property within a ten to forty day window,

after giving notice "[ajs soon as practicable." I.R.C. § 6335(a)-(b), (d). Finally, I.R.C. § 6342 explains the hierarchy in which the IRS must apply the proceeds from any sale. I.R.C. § 6342.

[1] The above Code provisions operate to create a system in which the IRS may seize property, sell it, and apply the proceeds from the sale to an outstanding tax ***1329** liability. In *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 103 S. Ct. 2309, 76 L.Ed.2d 515 (1983), the Supreme Court explained the function of these provisions:

> The Internal Revenue Code's levy and seizure provisions, 26 U.S.C. §§ 6331 and 6332, are special procedural devices available to the IRS to protect and satisfy its liens and are analogous to the remedies available to private secured creditors. They are provisional remedies that do not determine the Service's rights to the seized property, but merely bring the property into the Service's legal custody. At no point does the Service's interest in the property exceed the value of the lien. The IRS is obligated to return to the debtor any surplus from a sale. Ownership of the property is transferred only when the property is sold to a bona fide purchaser at a tax sale. In fact, the tax sale provision itself refers to the debtor as the owner of the property after the seizure but prior to the sale.

462 U.S. at 210-11, 103 S.Ct. 2309 (citations omitted). In other words, liens the IRS may put on property "do not transfer ownership of the property to the IRS."W. at 210, 103 S.Ct. 2309.

[2] Taxpayers argue, however, that once various financial institutions turned their funds over to the IRS, the IRS "had full dominion and control over the levied assets." They contend that this full and complete dominion constituted constructive possession of the funds by the IRS. From that premise, taxpayers argue that because no sale was required with respect to cash and cash equivalents in the possession of the IRS, and because section 6342 requires that the IRS "shall" apply "money realized" under levies to tax liabilities, the levies themselves effectuated a payment.

Taxpayers are mistaken. As seen, section 6331 grants the IRS the power to attach its interest to property via a lien: the IRS gets nothing more than a secured interest. As noted, in *Whiting Pools,* the Court stated that the remedies provided to the IRS by l.R.C. §§ 6331 and 6332"are provisional remedies that do not determine the Service's rights to the seized property, but merely bring the property into the Service's legal custody.... Ownership of the property is transferred only when the property is sold to a bona fide purchaser at a tax sale." 426 U.S. at 210-11, 96 S.Ct. 2022; *see Stead v. United States,* 419 F.3d 944, 947-48 (9th Cir.2005) ("[T]he IRS ordinarily does not take title to a levied upon property until the government reaps the proceeds of a tax sale or otherwise collects on the property of the taxpayer. This framework applies to cash and cash equivalents." (Citations omitted)). Moreover, there is nothing unusual or exceptional about claiming a security interest in money. *See U.C.C.* § 9-312(b)(3) (2006) (requiring possession of money in order to perfect a security interest). In short, we see no

reason to treat cash and cash equivalents differently from other forms of property under the same statutory section. Because the IRS does not take ownership of property when it levies, but ef-fectively only has a security interest, the IRS's levy against taxpayers was not a payment of their tax liabilities so as to stop the accrual of interest under l.R.C. § 6601(a).

B.

[3] Neither did the placement of taxpayers' funds in the escrow account constitute the payme of their tax liabilities so as to stop the accrual of interest under I.R.C. § 6601(a). The fourth WHEREAS clause of the escrow agreement recited that "the taxpayers and the District Director are willing to make such arrangements as are necessary and proper in order to avoid the necessity for seizure and/or sales of all property of the taxpayers." This clause indicates the mutual intent*1330 of the contracting parties to avoid the seizure and sale of taxpayers' property-actions that would have resulted in the payment of the tax liabilities at issue.

Provisions of the escrow agreement following the WHEREAS clauses effectuated the parties' intent Thus, the IRS was required to "turn over to the Escrow Agents all funds received or to be received, as a result of levies on the taxpayers' bank accounts, brokerage accounts, wages, and any other asset accounts." Further, under the escrow agreement, funds deposited with the Escrow Agents were to be "invested with a federally insured bank or savings and loan in certificates of deposit at the best interest

rates then obtainable," and interest obtained was to "accrue to the benefit of taxpayers" and was to be "taxable to them." Under the escrow agreement, there were two Escrow Agents, one representing the IRS and one representing taxpayers, and the agreement provided in pertinent part that escrowed funds could be distributed only after "[t]he parties ... agreed in writing on the proportion and amount of division and distribution of all or any part of the escrowed funds ... or [a] federal court of competent jurisdiction ... entered final judgment determining the tax liability of the taxpayers." [TM5] Thus, under the terms of the escrow agreement, the IRS could not apply escrowed funds to taxpayers' tax liabilities as a payment without the consent of the Escrow Agents or until a court of competent jurisdiction made a final determination as to those liabilities. Most importantly, the escrow agreement explicitly stated: "This agreement is entered into solely for the purpose of securing the payment of the taxpayers' tax liability *and is not to be considered as payment of such* //a&/#)'."(Emphasis added). In sum, the provisions of the escrow agreement make it clear that the deposit of taxpayers' funds in the escrow account was for the purpose of securing the payment of their tax liabilities and did not constitute payment of those liabilities.

FN5. During the existence of the escrow account, disbursements were made to taxpayers to pay certain living and business expenses.

Given the terms of the escrow agreement in this case, we think *Rosenman* is controlling on the question of whether a payment was made. In

Rosenman, the taxpayer estate did not know the extent of its tax liability at the time it filed its estate tax return in December of 1934. It therefore remitted under protest a "payment" of $120,000, which the IRS placed in a suspense account 323 U.S. at 659-60, 65 S.Ct. 536. hi 1938, after an audit was completed, the estate was required to pay an additional SI0,497 in taxes. *Id.* The estate then filed for a refund, challenging the amount due based on new deductions. However, because the estate's claim for a refund was filed more than three years after the original $120,000 remittance, the government argued that the claim was barred by the statute of limitations. The Supreme Court rejected the government's argument, stating that the SI20,000 remittance was not a payment of tax:

> But on December 24, 1934, the taxpayer did not discharge what he deemed a liability nor pay one that was asserted. There was merely an interim arrangement to cover whatever contingencies the future might define. The tax obligation did not become defined until April 1938. And this is the practical construction which the Government has placed upon such arrangements. The Government does not consider such advances of estimated taxes as taxpayments.*1331 They are, as it were, payments in escrow.

Id at 662, 65 S.Ct. 536.

We think that, in view of the terms of the escrow agreement in this case, *Rosenman* compels the conclusion that the deposit of taxpayers' funds in the escrow account did not constitute the payment of

taxes, so as to stop the accrual of underpayment interest under I.R.C. § 6601 (a). In this case, taxpayers' funds were held in escrow, and the escrow agreement explicitly stated that placement of their funds in the account did not constitute the payment of taxes.

Faced with the escrow agreement, taxpayers argue that the agreement's description of the escrowed funds as not a payment was a precautionary measure to insure that the Tax Court was not divested of jurisdiction because the Tax Court's jurisdiction depends on a deficiency in tax. We are not persuaded by taxpayers' contentions with respect to the escrow agreement. Taxpayers' argument as to the purpose of the provision stating that the deposit of funds in the escrow account was not to be considered the payment of tax liabilities is undermined by the provisions of the escrow agreement noted above. As discussed, those provisions make it clear that it was the intent of taxpayers and the IRS to structure an arrangement whereby the IRS would have a security interest in taxpayers' assets and taxpayers would have access to their funds as they needed them while they contested their tax liability in the Tax Court. Moreover, even if it is assumed that the purpose of the provision at issue was to facilitate Tax Court jurisdiction, *see Baral v. United States,* 528 U.S. 431, 439 n. 2, 120 S.Ct. 1006, 145 L.Ed.2d 949 (2000) ("[T]he taxpayer will often desire treatment of the remittance as a deposit-even if this means forfeiting the right to interest on an overpayment-in order to preserve jurisdiction in the Tax Court, which depends on the existence of a deficiency, 26 U.S.C. § 6213 (1994 ed. and Supp. III), a

deficiency that would be wiped out by treatment of the remittance as a payment")? the fact remains that the provision accomplished that goal by stating that escrow account funds "were not to be considered as payment" of taxpayers' tax liabilities. In short, whatever its purpose was, the legal effect of the provision was the same. The deposit of funds in the escrow account was not a payment of taxes.

Taxpayers seek to distinguish *Rosenman* on the ground that, in that case, when the $120,000 remittance was made, there had not yet been an assessment, whereas in this case a jeopardy assessment had been made, against which the escrowed funds could be applied. The problem with taxpayers' attempt to distinguish *Rosenman* is the escrow agreement. In the agreement, taxpayers and the IRS explicitly agreed that the funds put in the escrow account did not constitute a payment: "This agreement is entered into solely for the purpose of securing the payment of the taxpayers' tax liability and is not to be considered as payment of such liability." It is thus irrelevant that in *Rosenman* there had not been a jeopardy assessment.

Finally, taxpayers direct our attention to *Stone v. Commissioner, mem. sur order,"No.* 5311-72 (T.C. Mar. 30, 1987). In that case, Stone and the IRS disagreed, *inter alia,* as to the calculation of interest on a tax deficiency. The IRS had levied on funds in two bank accounts and on an escrow account. *Id* 3-5.The funds in the bank accounts were levied on by the IRS in March of 1972, but the banks did not remit the funds to the IRS until about one year later. *Id* at 3-4 & n. 5. Similarly, the IRS levied on the

escrow account in February of 1972, but did not take possession *1332 of the escrowed funds until 1980. *Id.* at 5. The government stipulated that if it had constructive possession of the funds in Stone's bank accounts and the escrow account, then interest on the portion of the deficiency covered by the funds should cease to run. *Id* at 4. The Tax Court held that the government was in constructive possession of the funds in both the bank accounts and the escrow account once it levied on them because it could have demanded payment at any time pursuant to I.R.C. § 6332. *Id.* at 4-5. Accordingly, interest stopped accruing under I.R.C. § 6601 (a). Stone does not help taxpayers, however. In the first place, in this case, the government has not entered the kind of stipulation it did in Stone. Most importantly, in this case, because of the terms of the escrow agreement, the IRS could not have demanded the payment of taxes from funds in the escrow account. At the same time, taxpayers and the IRS stated in the escrow agreement that the placement of funds in the escrow account did not constitute the payment of taxpayers' tax liabilities.

CONCLUSION

For the forgoing reasons, we hold that neither the IRS's levies nor the placement of taxpayers' funds in the escrow account constituted the payment of taxpayers' tax liabilities so as to stop the accrual of interest under I.R.C. § 6601 (a). The final judgment of the Court of Federal Claims denying taxpayers' requests for refunds and dismissing their complaints is therefore

AFFIRMED.

C.A.Fed., 2007.
LaRosa's Intern. Fuel Co., Inc. v. U.S.
499 F.3d 1324, 100 A.F.T.R.2d 2007-6042, 2007-2 USTC P 50,657

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56 Fed.Cl. 102
56 Fed.Cl. 102, 91 A.F.T.R.2d 2003-1701, 2003-1 USTC P 50,407
(Cite as: 56 Fed.Cl. 102)

LaRosa's Int'l Fuel Co., Inc. v. U.S.
Fed.Cl.,2003.

United States Court of Federal Claims.
LAROSA'S INT'L FUEL CO., INC. Plaintiff,

v.

The UNITED STATES, Defendant.
Nos. 97-834T, 97-835T.

April 3, 2003.

Taxpayer brought suit against the United States claiming entitlement to an income tax refund based on contention that the Internal Revenue Service (IRS) charged excessive interest on tax liabilities. On cross-motions for summary judgment, the Court of Federal Claims, Smith, Senior Judge, held that interest continued to run on income tax underpayments after levies on taxpayer's assets, through period that levied assets were held in escrow, and until taxpayer paid said tax liabilities.

Plaintiffs motion denied; defendant's cross-motion granted.

West Headnotes

Internal Revenue 220 €=4831

220 Internal Revenue \
220XXIV Payment
220k4831 k. Amount Due, Interest and Fees.

Most Cited Cases

Interest continued to run on income tax underpayments after levies on taxpayer's assets, through period that levied assets were held in escrow, and until taxpayer paid said tax liabilities. 26 U.S.C.A, §§6331,6601.
***103** David J. Fischer,Baker & Hostetler LLP, Washington, D.C. for Plaintiff.

David R. House, Court of Federal Claims Section, Tax Division, U.S. Department of Justice, with whom were Eileen J. O'Connor, Assistant Attorney General, Mildred L. Seidman, Chief, Court of Federal Claims Section, and Steven I. Frahm, Assistant Section Chief, for defendant.

ORDER

SMITH, Senior Judge.

The instant case arose on December 3, 1985, when the Internal Revenue Service (the "IRS") began examining the federal income tax returns of LaRosa's International Fuel Company and Joseph **LaRosa,** a shareholder in **LaRosa's** International Fuel Company (together referred to hereinafter as "Plaintiff"). The IRS determined that Plaintiff owed the IRS $11,852,793.00 in unpaid taxes, penalties,

and interest on the unpaid taxes, from the period between 1979 and 1983, and $789,665.00 in unpaid taxes, penalties, and interest on the unpaid taxes from the period between 1981 and 1983. The IRS consequently seized $9 million of Plaintiffs assets by levy under Section 6331 of the Internal Revenue Code, (the "Code"), 26 U.S.C. § 6331 (1985). The IRS also issued a statutory notice of tax deficiency to Plaintiff.

On January 16, 1986, Plaintiff and the IRS signed an escrow agreement. The agreement provided that the IRS would hold the seized amounts in escrow, that the IRS would release certain amounts from the escrow to help Plaintiff cover business and personal expenses, that the IRS would not return the principal balance of the seized assets until after resolution of Plaintiffs Tax Court petition, that the assets held in escrow would not be considered payment of Plaintiffs tax liabilities, and that all interest on the escrow would accrue to Plaintiff. In March 1986, Plaintiff filed a petition in the United States Tax Court to contest the statutory notice of deficiency.

In November 1990, the United States Tax Court entered Stipulated Decisions setting forth the taxes and additions to tax due from Plaintiff. In March 1991, the parties entered into agreements necessary to settle the tax deficiencies at issue. In May 1991, Plaintiff submitted payment of its tax liability to the IRS, and the IRS released the funds held in escrow and interest on those funds to Plaintiff.

On April 29, 1993, Plaintiff filed a claim with the IRS for a refund. Plaintiff alleged that the amount that it had paid to cover interest on tax liabilities was excessive, and that Plaintiff therefore deserved a refund. The IRS denied the refund, and Plaintiff responded by filing suit for relief before this Court on December 5, 1997. Defendant counterclaimed in April 2000, arguing that Plaintiff owes the IRS interest on unpaid taxes. On December 11, 2002, Plaintiff filed for summary judgement against Defendant, alleging that as of December 3, 1985, the IRS had actual or constructive possession of Plaintiffs assets in sufficient amount to satisfy Plaintiffs tax liabilities and, as a matter of law, should have credited the full value of the seized assets against the IRS' tax assessments. According to Plaintiff, the IRS should have consequently suspended the running of interest on Plaintiffs tax deficiencies as of December 3, 1985. Plaintiff claimed that seizure of assets by levy constituted a payment of Plaintiffs outstanding tax deficiencies,*104 resulting in no further interest due to the government under Section 6601 of the Code.

On December 6, 2002, the government moved for partial summary judgment [FN1] on the issue of whether Plaintiffs liability for interest on the tax deficiencies continued to run after the seized assets were placed in escrow. Defendant alleged that a tax is paid only when iunds are actually applied to satisfy tax assessments under Section 6601, rather than when a levy occurs and the levied amounts are placed in escrow. After full briefing and holding oral argument on the parties' summary judgment motions on February 12, 2003, the Court hereby

DENIES Plaintiffs motion for summary judgment and GRANTS Defendant's cross motion for partial summary judgment.

> FN1. Judgment requested by Defendant is partial because the parties agreed to reserve determination of the remaining issue of computation of defendant's counter-claim as against **La Rosa's** International Fuel Company pending the instant de cision.

The Court cannot accept Plaintiffs characterization of the seizure of Plaintiffs assets by levy under Section 6601 and subsequent placement of the funds into escrow as a payment of Plaintiffs tax deficiencies. According to the Supreme Court in *Rosenman v. United States,* 323 U.S. 658, 662, 65 S.Ct. 536, 89 L.Ed. 535 (1945), a tax payment occurs when the IRS actually applies funds to a particular tax liability; it is not enough to place funds into a "suspense" account, or escrow, which merely functions as a surety against the future payment of said liability. Thus, "[tjhe receipt by the Government of moneys under such an arrangement carries no more significance than would the giving of a surety, bond. Money in these accounts is held not as taxes duly collected but as a deposit made in the nature of a cash bond for the payment of taxes thereafter found to be due." *Rosenman,* 323 U.S. at 662, 65 S.Ct. 536. Indeed, characterizing money held in escrow as a payment results in the illogical conclusion that they represent the payment of tax liabilities, even if the IRS ultimately releases an escrow and the deficient taxpayer does not satisfy its tax liabilities until later.

Furthermore, the transfer of the levied assets into escrow fails to demonstrate dominion and control over the assets sufficient to deem the seizure a payment. While the escrow agreement gave the IRS substantial power to manage the levied assets, this power did not include the ability to use this money for government purposes. Thus, any characterization of the escrow as a payment confuses the function of the escrow as security, with an actual legal satisfaction of liability. *See Rosenman,* 323 U.S. at 662, 65 S.Ct. 536.

For the above reasons, the Court finds that Defendant is entitled to partial summary judgment and holds that interest continued to run on Plaintiffs tax underpayments after the levies on Plaintiffs assets, through the period that the levied assets were held in escrow, and until Plaintiff paid said tax liabilities. The Court will SCHEDULE a status conference to occur within 60 days to discuss the computation of Plaintiffs unpaid interest on the tax deficiencies owed to the government.

IT IS SO ORDERED.

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UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

ANDREW L. STONE, Petitioner, V. COMMISSIONER OF INTERNAL REVENUE. Respondent.	Docket No. 5311-72

MEMORANDUM SUR ORDER

The parties have submitted separate Rule 155 computations and memoranda in support of their respective calculations in accordance with the procedure provided by Rule 155(b). The parties are in agreement as to the amount of the deficiencies in Federal income tax for petitioner's taxable years 1963, 1964, 1965 and 1966 as well as the overpayment for 1967, all determined in accordance with the findings and conclusions of the court in Jane C. Rosenbaum, et al. v. Commissioner, T.C. Memo. 1983-113. However, the parties, are in dispute over the existence and amount of the overpayment of these deficiencies which petitioner contends has been made as a result of certain post notice of deficiency payments. In order to resolve the parties' dispute and enter a Decision in. this case we must decide certain legal issues. The parties' calculations are based on their opposing positions as to"the proper resolution of these issues.

We must first decide whether interest on additions to tax for fraud under section 6653(b)[1] runs from the date of notice and demand following a jeopardy assessment or from the date of notice and demand following a final decision of the Court. Many of the facts pertaining to the collection of the 1972 jeopardy assessment against petitioner have already been found by this Court in Stone v. Commissioner, T.C. Memo. 1984-187[2] and we do not repeat them here. It is respondent's position that interest on the additions to tax for fraud for petitioner's taxable years 1963-1964 began to run from the date of the notice and demand following the jeopardy assessments in 1972. Petitioner argues that interest has not yet begun to run because a final decision in this case has not been entered. We agree with petitioner.

Section 6601(e)(2)[3] provides the general rule that interest does not begin to run on an assessable penalty

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[1] All section references are to the Internal Revenue Code of1954, as amended and in effect during the taxable years in issue.

[2] This case involved deficiencies in Federal income taxes of petitioner herein Andrew L. Stone and his wife M. Jeanne Stone for their taxable years 1972, 1973, 1974 and 1975.

[3] Prior to July 1, 1975, section 6601(b) was designated as section 6601(c) and section 6601(e) was designated as section 6601(f). For convenience, we shall refer to those subsections as they appear after June 30, 1975.

unless it is not paid within ten days from the date of notice and demand therefor. Because petitioner filed a timely petition with the Court in the instant action, pursuant to section 6213(a) no assessment may be made until the decision of the Tax Court has become final. Thereafter, respondent may assess the deficiency and fraud penalty found by the Court, to be due and the taxpayer is obligated to pay the amount assessed upon notice and demand. Section 6215(a). If the taxpayer fails to pay within the 10 day period after notice and demand, interest begins to run from the date of such notice and demand. Section 6601(e)(2). Respondent contends that such general rule does not apply in the context of a jeopardy assessment.

In Decker v. United States, 531 F.2d 543 (Ct. Cl. 1976), the court of Claims held that this general rule also applies where a jeopardy assessment has been made. Section 6601(b)(3) provides as follows:

> (3) Jeopardy.—
>
> The last date prescribed for payment shall be determined without regard to any notice and demand for payment issued, by reason of jeopardy (as provided in chapter 70), prior to the last date otherwise prescribed for such payment.

The Court found that the proper reading of section 6601(b)(3) was that Congress intended to prevent interest from accruing by virtue of the Commissioner's use of the jeopardy assessment

provisions where it would not have otherwise accrued. The court further noted that:

> If jeopardy assessments had not been made in this case, it is undisputed that payment of the 50% addition to plaintiffs' income tax liability could not have been demanded until after a final decision by the Tax Court on plaintiffs' petition. * * * Accordingly, we find that it is this latter date, i.e., the date that the addition to tax would have been due in the absence of the jeopardy assessments, that is the last date otherwise prescribed for payment of the 50% addition to plaintiffs' tax. Since the notice and demand issued to plaintiffs pursuant to the jeopardy assessments preceded the last date otherwise prescribed for payment of the 50% addition to tax, Section [6601(b)(3)] bars the IRS from assessing and collecting interest on the addition to tax. (Footnotes omitted). 531 F.2d at 546-547.

Respondent argues that Decker was incorrectly decided and contends that section 6601(b)(3) applies only in the case of a jeopardy assessment occurring prior to the last date otherwise prescribed for payment, i.e., a termination assessment under section 6851. We find this argument unpersuasive, as did the court in Decker in rejecting this narrow interpretation urged by the government in that case. The court in Decker noted

that section 6601(b)(3) was a remedial statute enacted to prevent interest from accruing by virtue of the Commissioner's use of the jeopardy assessment provisions where such interest would not have otherwise accrued.[4] Respondent's view of the statute would permit the Commissioner not Only to obtain advance payment of the additions to tax but also recover interest on the additions to which it would not otherwise be entitled. We believe such an interpretation would be a perversion of the remedial purpose of the statute.

Moreover, we believe section 6601(b)(3) is clear on its face. The statutory language itself refers specifically to "Chapter 70" of the Internal Revenue Code which includes all sections from section 6851 to 6873. Respondent's contention that section 6601(b)(3) applies only to termination assessments under section 6851 ignores the language of the statute itself and is, therefore, without merit. Therefore, because the final decision of this court has not yet been, entered, no interest has begun to run on the additions to tax for fraud herein.

We must next decide whether interest ceased running on the -portion of the deficiency equal to the account balances in two banks as of the date of

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[4] The Court of Claims in Motor Fuel Carriers, Inc. v. United States, 420 F.2d 702 (ct.Cl. 1970) noted that interest does not run on the accumulated earnings tax and the sanctions for civil fraud and negligence from the due date of the return because an administrative determination must precede the imposition of such-items.

respondent's levies on such accounts. In March 1972, after the jeopardy assessment was made against petitioner, respondent served notices of levy on Marine Midland Trust and the First National Bank in St. Louis, Missouri, to seize petitioner's accounts at those financial institutions. The banks did not immediately pay to respondent the account balances on the levy dates but rather remitted the amounts approximately one year later.[5] Respondent concedes that interest on the portion of the deficiency equal to the balances in the accounts ($15,247.15 in the case of Marine Midland Trust and $44,875.50 in the case of the First National Bank) ceased to run as of the dates of the levies if we find that respondent had constructive possession of those funds as of those dates.

It is unclear whether respondent, at the time it levied on the two accounts in 1972, failed to demand surrender of the funds immediately or whether the banks simply failed to honor respondent's demand. In any event, it is clear from section 6332 that respondent had the right to require immediate surrender of the possession of such funds from the banks. See United States v. Augspurger, 81-1 USTC 9404 (USDC, W.D. N.Y. 1981). Thus, we believe respondent had constructive possession of such funds as of the date of the levies. To the extent that respondent suffered any pecuniary loss resulting from the failure of the banks to

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[5] Marine Midland Trust remitted the account balance to the Internal Revenue Service on February 1, 1973 and the First National Bank remitted the account balance on January 15, 1973.

immediately honor the levies, section 6332(c) provides for a penalty against the custodian of the property. Since respondent could have immediately demanded payment of the funds and had recourse against the banks for failure to' honor the demand, for payment, respondent constructively received those funds prior to their actual receipt.

The United States Supreme Court has recently stated that the effect of a notice of levy is to give the Government constructive possession of such property. The Court stated:

> In the situation where a taxpayer's property is held by another, a notice of levy upon the custodian is customarily served pursuant to section 6332(a). This notice gives the IRS the right to all property levied upon, United States v. Eiland, 223 F.2d 118, 121 (CA4 1955), and creates a custodial relationship between the person holding the property and the IRS so that the property comes into the constructive possession of the Government. Phelps v. United States, 421 U.S. 330, 334 (1975). if the custodian honors the levy, he is "discharged from any obligation or liability to the delinquent taxpayer with respect to such property or rights to property arising from such surrender or payment." Section 6332(d). If, on the other hand, the custodian refuses to

> honor a levy, he incurs liability to the Government for his refusal. Section 6332(c)(1).

United States v. National Bank of Commerce, 472 U.S. 713, 720-721 (1985).

Thus, we find that interest ceased to run on the portion of the deficiency equal to the account balances as of the dates of the levies.

The next issue is whether a levy by respondent on an escrow account stopped the running of interest on the deficiency. Petitioner and the Department of Justice entered into an escrow agreement on July 24, 1970, whereby petitioner deposited $2,500,000 par value of short-term bonds and U.S. Treasury Bills and 21,600 shares of Concord Control, Inc. into an escrow account at St. Louis Union Trust Company. Dividends and interest received on the escrowed securities were to be deposited into petitioner's account at the First National Bank in St. Louis. On February 8, 1972, respondent filed a notice of levy on the Trust Company instructing it to retain the principal and to hold all income it received. The income from the escrow account was placed in a separate account and it, in turn, earned interest.

In St. Louis Union Trust Co. v. United States, 617 F.2d 1293, 1294 (8th Cir. 1980), the Court of Appeals for the Eighth Circuit held that petitioner's right under the 1970 escrow agreement to receive income from the escrowed bonds and stocks was a property right subject to seizure by levy and that respondent's first levy in 1972 seized the petitioner's

right to the income from the escrowed securities. In addition,, this Court has ruled that petitioner did not constructively receive the income earned in the income account from 1972 through 1975. Stone v. Commissioner, T.C. Memo. 1984-187.

Respondent argues that he did not have possession of the income account until 1980 when the interpleader action brought by the St. Louis Union Trust Company was final.[6] However, it is clear that when respondent levied on the income account in 1972, it had the right to demand immediate surrender of the funds under section 6332. Respondent chose not to do so, however, but rather instructed the trust company to retain the funds. As a result of the 1972 levy, petitioner had no access to the income account by which respondent was assured of collection of the asserted tax. There were no legal actions pending at the time of the 1972 levy to delay respondent's seizure of the funds. It is at that point that respondent constructively received the funds in the interest account. United States v. National Bank of Commerce, supra. If respondent had taken actual possession of the funds at that point, there is no question but that interest would cease running *on* that portion of the deficiency. The fact that respondent delayed taking actual possession of the funds at that time should not require a different result.

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[6] Petitioner's computations take into consideration the running of interest from March 15, 1976 when the interpleader action was brought until the decision therein was final in 1980.

The final issue presented[7] is whether funds paid to the United States Treasury by a bank in Switzerland should be credited against the deficiency. In Rosenbaum v. Commissioner, T.C. Memo. 1983-113, we held that amounts remitted to a bank account in Switzerland (the "Agencia Account") constituted income in equal amounts to petitioner herein and petitioner in that case, Francis Rosenbaum. Petitioner recently learned, in response to a Freedom of Information Act request that the Swiss Bank paid to the United states Treasury the amounts it held on deposit, as well as shares of Alsco, Inc. stock.

Respondent does not claim that the money was not transferred to the Treasury. Rather, respondent argues that petitioner is unable to prove that such transfer occurred. While the facts are somewhat unclear on this issue, what is clear is that petitioner has made every effort to determine the whereabouts of the funds transferred out of the Swiss account. Petitioner has made a prima facie showing that the amount was paid to the United States Treasury. Respondent has introduced no evidence to rebut petitioner's evidence or to show why a payment to the United States Treasury should not be credited against petitioner's tax liabilities. Accordingly, our decision herein will be entered in accordance with petitioner's Rule 155 computation.

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[7] Another issue concerning the effect of a 1980 settlement of a sequestration action against petitioner's wife and the resulting payment of $157,915 to respondent has been conceded by the respondent.

/s/
Richard C. Wilbur
Judge

Washington, D.C.
Dated: March 30, 1987

11 USC § 542. Turnover of property to the estate

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

(b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

(c) Except as provided in section 362(a)(7) of this title, an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.

(d) A life insurance company may transfer property of the estate or property of the debtor to such company in good faith, with the same effect with respect to such company as if the case under this title concerning the debtor had not been commenced, if such transfer is to pay a premium or to carry out a nonforfeiture insurance option, and is required to be made automatically, under a life insurance contract with such company that was entered into before the date of the filing of the petition and that is property of the estate.

(e) Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee.

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11 USC § 543. Turnover of property by a custodian

(a) A custodian with knowledge of the commencement of a case under this title concerning the debtor may not make any disbursement from, or take any action in the administration of, property of the debtor, proceeds, product, offspring, rents, or profits of such property, or property of the estate, in the possession, custody, or control of such custodian, except such action as is necessary to preserve such property.

(b) A custodian shall—

(1) deliver to the trustee any property of the debtor held by or transferred to such custodian, or proceeds, product, offspring, rents, or profits of such property, that is in such custodian's possession, custody, or control on the date that such custodian acquires knowledge of the commencement of the case; and

(2) file an accounting of any property of the debtor, or proceeds, product, offspring, rents, or profits of such property, that, at any time, came into the possession, custody, or control of such custodian.

(c) The court, after notice and a hearing, shall—

(1) protect all entities to which a custodian has become obligated with respect to such property or proceeds, product, offspring, rents, or profits of such property;

(2) provide for the payment of reasonable compensation for services rendered and costs and expenses incurred by such custodian; and

(3) surcharge such custodian, other than an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, for any improper or excessive disbursement, other than a disbursement that has been made in accordance with applicable law or that has been approved, after notice and a hearing, by a court of competent jurisdiction before the commencement of the case under this title.

(d) After notice and hearing, the bankruptcy court-

(1) may excuse compliance with subsection (a), (b), or (c) of this section if the interests of creditors and, if the debtor is not insolvent, of equity security holders would be better served by permitting a custodian to continue in possession, custody, or control of such property, and

(2) shall excuse compliance with subsections (a) and (b)(1) of this section if the custodian is an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, unless compliance with such subsections is necessary to prevent fraud or injustice.

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26 USC § 6331. Levy and distraint

(a) Authority of Secretary.-If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and sale of property.-The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (e), a levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or

rights to property (whether real or personal, tangible or intangible).

(c) **Successive seizures**.-Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

(d) **Requirement of notice before levy.—**

(1)**In general**—Levy may be made under subsection (a) upon the salary or wages or other property of any person with respect to any unpaid tax only after the Secretary has notified such person in writing of his intention to make such levy.

(2)**30-day requirement**—The notice required under paragraph (1) shall be-

(A) given in person,

(B) left at the dwelling or usual place of business of such person, or

(C) sent by certified or registered mail to such person's last known address, no less than 30 days before the day of the levy.

(3)**Jeopardy.**—Paragraph (1) shall not apply to a levy if the Secretary has made a finding under the last sentence of subsection (a) that the collection of tax is in jeopardy.

(4)**Information included with notice.**—The notice required under paragraph (1) shall include a brief statement which sets forth in simple and nontechnical terms-

(A) the provisions of this title relating to levy and sale of property,

(B) the procedures applicable to the levy and sale of property under this title,

(C) the administrative appeals available to the taxpayer with respect to such levy and sale and the procedures relating to such appeals,

(D) the alternatives available to taxpayers which could prevent levy on the property (including installment agreements under section 6159),

(E) the provisions of this title relating to redemption of property and release of liens on property, and

(F) the procedures applicable to the redemption of property and the release of a lien on property under this title.

(e) Continuing levy on salary and wages.—The effect of a levy on salary or wages payable to or received by a taxpayer shall be continuous from the date such levy is first made until such levy is released under section 6343.

(f) Uneconomical levy.—No levy may be made on any property if the amount of the expenses which the Secretary estimates (at the time of levy) would be incurred by the Secretary with respect to the levy and sale of such property exceeds the fair market value of such property at the time of levy.

(g) Levy on appearance date of summons.—

(1) In general.—No levy may be made on the property of any person on any day on which such person (or officer or employee of such person) is required to appear in response to a summons issued by the Secretary for the purpose of collecting any underpayment of tax.

(2) No application in case of jeopardy.—This subsection shall not apply if the Secretary finds that the collection of tax is in jeopardy.

(h) Continuing levy on certain payments.-

(1) In general.—If the Secretary approves a levy under this subsection, the effect of a levy on specified payments to or received by a taxpayer shall be continuous from the date such levy is first made until such levy is released. Notwithstanding section 6334 such continuous

levy shall attach to up to 15 percent of any specified payment due to the taxpayer.

(2) Specified payment.--For the purposes of paragraph (1), the term "specified payment" means—

(A) any Federal payment other than a payment for which eligibility is based on the income or assets (or both) of a payee,

(B) any payment described in paragraph (4), (7), (9), or (11) of section 6334(a), and

(C) any annuity or pension payment under the Railroad Retirement Act or benefit under the Railroad Unemployment Insurance Act.

(3) Increase in levy for certain payments.-- Paragraph (1) shall be applied by substituting "100 percent" for "15 percent" in the case of any specified payment due to a vendor of goods or services sold or leased to the Federal Government.

(i) No levy during pendency of proceedings for refund of divisible tax.—

(1) In general.—No levy may be made under subsection (a) on the property or rights to property of any person with respect to any unpaid divisible tax during the pendency of any proceeding brought by such person in a proper Federal trial court for the recovery of any portion

of such divisible tax which was paid by such person if-

(A) the decision in such proceeding would be res judicata with respect to such unpaid tax; or

(B) such person would be collaterally estopped from contesting such unpaid tax by reason of such proceeding.

(2) Divisible tax.—For purposes of paragraph (1), the term "divisible tax" means—

(A) any tax imposed by subtitle C; and

(B) the penalty imposed by section 6672 with respect to any such tax.

(3) Exceptions.—

(A) Certain unpaid taxes.—This subsection shall not apply with respect to any unpaid tax if—

(i) the taxpayer files a written notice with the Secretary which waives the restriction imposed by this subsection on levy with respect to such tax; or

(ii) the Secretary finds that the collection of such tax is in jeopardy.

(B) Certain levies.—This subsection shall not apply to—

(i) any levy to carry out an offset under section 6402; and

(ii) any levy which was first made before the date that the applicable proceeding under this subsection commenced.

(4) Limitation on collection activity; authority to enjoin collection.—

(A) Limitation on collection.--No proceeding in court for the collection of any unpaid tax to which paragraph (1) applies shall be begun by the Secretary during the pendency of a proceeding under such paragraph. This subparagraph shall not apply to—

(i) any counterclaim in a proceeding under such paragraph; or
(ii) any proceeding relating to a proceeding under such paragraph.

(B) Authority to enjoin.-Notwithstanding section 7421 (a), a levy or collection proceeding prohibited by this subsection may be enjoined (during the period such prohibition is in force) by the court in which the proceeding under paragraph (1) is brought.

(5) **Suspension of statute of limitations on collection.**-The period of limitations under section 6502 shall be suspended for the period during which the Secretary is prohibited under this subsection from making a levy.

(6) **Pendency of proceeding**.--For purposes of this subsection, a proceeding is pending beginning on the date such proceeding commences and ending on the date that a final order or judgment from which an appeal may be taken is entered in such proceeding.

(j) No levy before investigation of status of property.—

(1) **In general.**-For purposes of applying the provisions of this subchapter, no levy may be made on any property or right to property which is to be sold under section 6335 until a thorough investigation of the status of such property has been completed.

(2) **Elements in investigation.**--For purposes of paragraph (1), an investigation of the status of any property shall include—

(A) a verification of the taxpayer's liability;

(B) the completion of an analysis under subsection (f);

(C) the determination that the equity in such property is sufficient to yield net proceeds

from the sale of such property to apply to such liability; and

(D) a thorough consideration of alternative collection methods.

(k) No levy while certain offers pending or installment agreement pending or in effect.—

(1) Offer-in-compromise pending.--No levy may be made under subsection (a) on the property or rights to property of any person with respect to any unpaid tax--

(A) during the period that an offer-in-compromise by such person under section 7122 of such unpaid tax is pending with the Secretary; and

(B) if such offer is rejected by the Secretary, during the 30 days thereafter (and, if an appeal of such rejection is filed within such 30 days, during the period that such appeal is pending).

For purposes of subparagraph (A), an offer is pending beginning on the date the Secretary accepts such offer for processing.

(2) Installment agreements.--No levy may be made under subsection (a) on the property or rights to property of any person with respect to any unpaid tax-

(A) during the period that an offer by such person for an installment agreement under section 6159 for payment of such unpaid tax is pending with the Secretary;

(B) if such offer is rejected by the Secretary, during the 30 days thereafter (and, if an appeal of such rejection is filed within such 30 days, during the period that such appeal is pending);

(C) during the period that such an installment agreement for payment of such unpaid tax is in effect; and

(D) if such agreement is terminated by the Secretary, during the 30 days thereafter (and, if an appeal of such termination is filed within such 30 days, during the period that such appeal is pending).

(3) Certain rules to apply.- Rules similar to the rules of—

(A) paragraphs (3) and (4) of subsection (i), and

(B) except in the case of paragraph (2)(C), paragraph (5) of subsection (i), shall apply for purposes of this subsection.

(l) Cross references.--

(1)For provisions relating to jeopardy, see subchapter A of chapter 70.

(2) For proceedings applicable to sale of seized property, see section 6335.

(3) For release and notice of release of levy, see section 6343.

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26 USC § 6332. Surrender of property subject to levy

(a) Requirement.-Except as otherwise provided in this section, any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Special rule for life insurance and endowment contracts.-

(1)In general.-A levy on an organization with respect to a life insurance or endowment contract issued by such organization shall, without necessity for the surrender of the contract document, constitute a demand by the Secretary for payment of the amount described in paragraph (2) and the exercise of the right of the person against whom the tax is assessed to the advance of such amount. Such organization shall pay over such amount 90 days after service of notice of levy. Such notice shall include a certification by the Secretary that a copy of such notice has been mailed to the person against whom the tax is assessed at his last known address.

(2)Satisfaction of levy.-Such levy shall be deemed to be satisfied if such organization pays

over to the Secretary the amount which the person against whom the tax is assessed could have had advanced to him by such organization on the date prescribed in paragraph (1) for the satisfaction of such levy, increased by the amount of any advance (including contractual interest thereon) made to such person on or after the date such organization had actual notice or knowledge (within the meaning of section 6323(i)(1) of the existence of the lien with respect to which such levy is made, other than an advance (including contractual interest thereon) made automatically to maintain such contract in force under an agreement entered into before such organization had such notice or knowledge.

(3)**Enforcement proceedings.**--The satisfaction of a levy under paragraph (2) shall be without prejudice to any civil action for the enforcement of any lien imposed by this title with respect to such contract.

(c)**Special rule for banks**.--Any bank (as defined in section 408(n)) shall surrender (subject to an attachment or execution under judicial process) any deposits (including interest thereon) in such bank only after 21 days after service of levy.

(d)**Enforcement of levy.-**

(1)**Extent of personal liability.**-Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary, shall be liable in his own person and estate to the United States in a

sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made, together with costs and interest on such sum at the underpayment rate established under section 6621 from the date of such levy (or, in the case of a levy described in section 6331(d)(3), from the date such person would otherwise have been obligated to pay over such amounts to the taxpayer). Any amount (other than costs) recovered under this paragraph shall be credited against the tax liability for the collection of which such levy was made.

(2)**Penalty for violation.**-In addition to the personal liability imposed by paragraph (1), if any person required to surrender property or rights to property fails or refuses to surrender such property or rights to property without reasonable cause, such person shall be liable for a penalty equal to 50 percent of the amount recoverable under paragraph (1). No part of such penalty shall be credited against the tax liability for the collection of which such levy was made.

(e) Effect of honoring levy.-Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary, surrenders such property or rights to property (or discharges such obligation) to the Secretary (or who pays a liability under subsection (d)(l)) shall be discharged from any obligation or liability to the delinquent taxpayer and any other

person with respect to such property or rights to property arising from such surrender or payment.

(e) Person defined.-The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

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26 USC § 6335. Sale of seized property

(a) **Notice of seizure.**-As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

(b) **Notice of sale.**-The Secretary shall as soon as practicable after the seizure of the property give notice to the owner, in the manner prescribed in subsection (a), and shall cause a notification to be published in some newspaper published or generally circulated within the county wherein such seizure is made, or if there be no newspaper published or generally circulated in such county, shall post such notice at the post office nearest the place where the seizure is made, and in not less than two other public places. Such notice shall specify the property to be sold, and the time, place, manner, and conditions of the sale thereof. Whenever levy is made without regard to the 10-day period provided in section 6331(a), public notice of sale of the property seized shall not be made within such 10-day period unless section 6336 (relating to sale of perishable goods) is applicable.

(c) **Sale of indivisible property.**-If any property liable to levy is not divisible, so as to enable the Secretary by sale of a part thereof to raise the whole amount of the tax and expenses, the whole of such property shall be sold.

(d) **Time and place of sale.**-The time of sale shall not be less than 10 days nor more than 40 days from the time of giving public notice under subsection (b). The place of sale shall be within the county in which the property is seized, except by special order of the Secretary.

(e) **Manner and conditions of sale-**

(1) In general.-

(A) Determinations relating to minimum price.-Before the sale of property seized by levy, the Secretary shall determine-

(i) a minimum price below which such property shall not be sold (taking into account the expense of making the levy and conducting the sale), and

(ii) whether, on the basis of criteria prescribed by the Secretary, the purchase of such property by the United States at such minimum price would be in the best interest of the United States.

(B) Sale to highest bidder at or above minimum price.-If, at the sale, one or more persons offer to purchase such property for

not less than the amount of the minimum price, the property shall be declared sold to the highest bidder.

(C) Property deemed sold to United States at minimum price in certain cases.-If no person offers the amount of the minimum price for such property at the sale and the Secretary has determined that the purchase of such property by the United States would be in the best interest of the United States, the property shall be declared to be sold to the United States at such minimum price.

(D) Release to owner in other cases.-If, at the sale, the property is not declared sold under subparagraph (B) or (C), the property shall be released to the owner thereof and the expense of the levy and sale shall be added to the amount of tax for the collection of which the levy was made. Any property released under this subparagraph shall remain subject to any lien imposed by subchapter C.

(2) Additional rules applicable to sale.-The Secretary shall by regulations prescribe the manner and other conditions of the sale of property seized by levy. If one or more alternative methods or conditions are permitted by regulations, the Secretary shall select the alternatives applicable to the sale. Such regulations shall provide:

(A) That the sale shall not be conducted in any manner other than-

(i) by public auction, or

(ii) by public sale under sealed bids.

(B) In the case of the seizure of several items of property, whether such items shall be offered separately, in groups, or in the aggregate; and whether such property shall be offered both separately (or in groups) and in the aggregate, and sold under whichever method produces the highest aggregate amount.

(C)Whether the announcement of the minimum price determined by the Secretary may be delayed until the receipt of the highest bid.

(D) Whether payment in full shall be required at the time of acceptance of a bid, or whether a part of such payment may be deferred for such period (not to exceed 1 month) as may be determined by the Secretary to be appropriate.

(E) The extent to which methods (including advertising) in addition to those prescribed in subsection (b) may be used in giving notice of the sale.

(F) Under what circumstances the Secretary may adjourn the sale from time to time (but

such adjournments shall not be for a period to exceed in all 1 month).

(3) Payment of amount bid.-If payment in full is required at the time of acceptance of a bid and is not then and there paid, the Secretary shall forthwith proceed to again sell the property in the manner provided in this subsection. If the conditions of the sale permit part of the payment to be deferred, and if such part is not paid within the prescribed period, suit may be instituted against the purchaser for the purchase price or such part thereof as has not been paid, together with interest at the rate of 6 percent per annum from the date of the sale; or, in the discretion of the Secretary, the sale may be declared by the Secretary to be null and void for failure to make full payment of the purchase price and the property may again be advertised and sold as provided in subsections (b) and (c) and this subsection. In the event of such readvertisement and sale any new purchaser shall receive such property or rights to property, free and clear of any claim or right of the former defaulting purchaser, of any nature whatsoever, and the amount paid upon the bid price by such defaulting purchaser shall be forfeited.

(4) Cross reference.-For provision providing for civil damages for violation of paragraph (1)(A)(i), see section 7433.

(f) Right to request sale of seized property within 60 days.-The owner of any property seized by levy may request that the Secretary sell

such property within 60 days after such request (or within such longer period as may be specified by the owner). The Secretary shall comply with such request unless the Secretary determines (and notifies the owner within such period) that such compliance would not be in the best interests of the United States.

(g) Stay of sale of seized property pending tax court decision.-

For restrictions on sale of seized property pending Tax Court decision, see section 6863(b)(3).

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26 USC § 6337. Redemption of property

(a) **Before sale**.-Any person whose property has been levied upon shall have the right to pay the amount due, together with the expenses of the proceeding, if any, to the Secretary at any time prior to the sale thereof, and upon such payment the Secretary shall restore such property to him, and all further proceedings in connection with the levy on such property shall cease from the time of such payment.

(b) **Redemption of real estate after sale.-**

(1) **Period.**-The owners of any real property sold as provided in section 6335, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of such property, at any time within 180 days after the sale thereof.

(2) **Price.**-Such property or tract of property shall be permitted to be redeemed upon payment to the purchaser, or in case he cannot be found in the county in which the property to be redeemed is situated, then to the Secretary, for the use of the purchaser, his heirs, or assigns, the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum.

(c) **Record.**-When any lands sold are redeemed as provided in this section, the Secretary shall cause entry of the fact to be made upon the record

mentioned in section 6340, and such entry shall be evidence of such redemption.

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26 USC § 6342. Application of proceeds of levy

(a) Collection of liability.-Any money realized by proceedings under this subchapter (whether by seizure, by surrender under section 6332 (except pursuant to subsection (c)(2) thereof), or by sale of seized property) or by sale of property redeemed by the United States (if the interest of the United States in such property was a lien arising under the provisions of this title) shall be applied as follows:

(1) **Expense of levy and sale.**-First, against the expenses of the proceedings;

(2) **Specific tax liability on seized property.**-If the property seized and sold is subject to a tax imposed by any internal revenue taw which has not been paid, the amount remaining after applying paragraph (1) shall then be applied against such tax liability (and, if such tax was not previously assessed, it shall then be assessed);

(3) **Liability of delinquent taxpayer.**-The amount, if any, remaining after applying paragraphs (1) and (2) shall then be applied against the liability in respect of which the levy was made or the sale was conducted.

(c) **Surplus proceeds.**-Any surplus proceeds remaining after the application of subsection (a) shall, upon application and satisfactory proof in support thereof, be credited or refunded by the

Secretary to the person or persons legally entitled thereto.

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26 USC § 6601. Interest on underpayment, nonpayment, or extensions of time for payment, of tax

(a) **General rule.**-If any amount of tax imposed by this title (whether required to be shown on a return, or to be paid by stamp or by some other method) is not paid on or before the last date prescribed for payment, interest on such amount at the underpayment rate established under section 6621 shall be paid for the period from such last date to the date paid.

(b) **Last date prescribed for payment.**-For purposes of this section, the last date prescribed for payment of the tax shall be determined under chapter 62 with the application of the following rules:

(1) **Extensions of time disregarded.**-The last date prescribed for payment shall be determined without regard to any extension of time for payment or any installment agreement entered into under section 6159.

(2) **Installment payments.**—In the case of an election under section 6156(a) to pay the tax in installments--

(A) The date prescribed for payment of each installment of the tax shown on the return shall be determined under section 6156(b). and

(B) The last date prescribed for payment of the first installment shall be deemed the last date prescribed for payment of any portion of the tax not shown on the return.

(3) Jeopardy.-The last date prescribed for payment shall be determined without regard to any notice and demand for payment issued, by reason of jeopardy (as provided in chapter 70), prior to the last date otherwise prescribed for such payment.

(4) Accumulated earnings tax.-In the case of the tax imposed by section 531 for any taxable year, the last date prescribed for payment shall be deemed to be the due date (without regard to extensions) for the return of tax imposed by subtitle A for such taxable year.

(5) Last date for payment not otherwise prescribed.-In the case of taxes payable by stamp and in all other cases in which the last date for payment is not otherwise prescribed, the last date for payment shall be deemed to be the date the liability for tax arises (and in no event shall be later than the date notice and demand for the tax is made by the Secretary).

(c) Suspension of interest in certain income, estate, gift, and certain excise tax cases.-In the case of a deficiency as defined in section 6211 (relating to income, estate, gift, and certain excise taxes), if a waiver of restrictions under section 6213(d) on the assessment of such deficiency has been filed, and if notice and demand by the

Secretary for payment of such deficiency is not made within 30 days after the filing of such waiver, interest shall not be imposed on such deficiency for the period beginning immediately after such 30th day and ending with the date of notice and demand and interest shall not be imposed during such period on any interest with respect to such deficiency for any prior period. In the case of a settlement under section 6224(c) which results in the conversion of partnership items to nonpartnership items pursuant to section 6231(b)(1)(C). the preceding sentence shall apply to a computational adjustment resulting from such settlement in the same manner as if such adjustment were a deficiency and such settlement were a waiver referred to in the preceding sentence.

(d) **Income tax reduced by carryback or adjustment for certain unused deductions.-**

(1) **Net operating loss or capital loss carryback.-**If the amount of any tax imposed by subtitle A is reduced by reason of a carryback of a net operating loss or net capital loss, such reduction in tax shall not affect the computation of interest under this section for the period ending with the filing date for the taxable year in which the net operating loss or net capital loss arises.

(2) **Foreign tax credit carrybacks.-**If any credit allowed for any taxable year is increased by reason of a carryback of tax paid or accrued to foreign countries or possessions of the United States, such increase shall not affect the

computation of interest under this section for the period ending with the filing date for the taxable year in which such taxes were in fact paid or accrued, or, with respect to any portion of such credit carryback from a taxable year attributable to a net operating loss carryback or a capital loss carryback from a subsequent taxable year, such increase shall not affect the computation of interest under this section for the period ending with the filing date for such subsequent taxable year.

(3) Certain credit carrybacks.-

(A) In general-If any credit allowed for any taxable year is increased by reason of a credit carryback, such increase shall not affect the computation of interest under this section for the period ending with the filing date for the taxable year in which the credit carryback arises, or, with respect to any portion of a credit carryback from a taxable year attributable to a net operating loss carryback, capital loss carryback, or other credit carryback from a subsequent taxable year, such increase shall not affect the computation of interest under this section for the period ending with the filing date for such subsequent taxable year.

(B) Credit carryback defined.-For purposes of this paragraph, the term "credit carryback" has the meaning given such term by section 6511(d)(4)(C).

(4) Filing date.-For purposes of this subsection, the term "filing date" has the meaning given to such term by section 6611(f)(4)(A).

(e) Applicable rules.-Except as otherwise provided in this title-

(1) Interest treated as tax.—Interest prescribed under this section on any tax shall be paid upon notice and demand, and shall be assessed, collected, and paid in the same manner as taxes. Any reference in this title (except subchapter B of chapter 63, relating to deficiency procedures) to any tax imposed by this title shall be deemed also to refer to interest imposed by this section on such tax.

(2) Interest on penalties, additional amounts, or additions to the tax,-

(A)In general.-Interest shall be imposed under subsection (a) in respect of any assessable penalty, additional amount, or addition to the tax (other than an addition to tax imposed under section 6651(a)(1) or 6653 or under part n of subchapter A of chapter 68) only if such assessable penalty, additional amount, or addition to the tax is not paid within 21 calendar days from the date of notice and demand therefor (10 business days if the amount for which such notice and demand is made equals or exceeds $100,000), and in such case interest shall be imposed only for the period from the date of the notice and demand to the date of payment.

(B)Interest on certain additions to tax.-Interest shall be imposed under this section with respect to any addition to tax imposed by section 6651(a)(1) or 6653 or under part II of subchapter A of chapter 68 for the period which-

(i) begins on the date on which the return of the tax with respect to which such addition to tax is imposed is required to be filed (including any extensions), and

(ii) ends on the date of payment of such addition to tax.

(3) Payments made within specified period after notice and demand.-If notice and demand is made for payment of any amount and if such amount is paid within 21 calendar days (10 business days if the amount for which such notice and demand is made equals or exceeds $100,000) after the date of such notice and demand, interest under this section on the amount so paid shall not be imposed for the period after the date of such notice and demand.

(f) Satisfaction by credits.-If any portion of a tax is satisfied by credit of an overpayment, then no interest shall be imposed under this section on the portion of the tax so satisfied for any period during which, if the credit had not been made, interest would have been allowable with respect to such overpayment. The preceding sentence shall not apply to the extent that section 6621(d) applies.

(g) Limitation on assessment and collection.- Interest prescribed under this section on any tax may be assessed and collected at any time during the period within which the tax to which such interest relates may be collected.

(h) Exception as to estimated tax.-This section shall not apply to any failure to pay any estimated tax required to be paid by section 6654 or 6655.

(i) Exception as to Federal unemployment tax.- This section shall not apply to any failure to make a payment of tax imposed by section 3301 for a calendar quarter or other period within a taxable year required under authority of section 6157.

(j) 2-percent rate on certain portion of estate tax extended under section 6166.-

(1) In general.-If the time for payment of an amount of tax imposed by chapter 11 is extended as provided in section 6166, then in lieu of the annual rate provided by subsection (a)-

(A) interest on the 2-percent portion of such amount shall be paid at the rate of 2 percent, and

(B) interest on so much of such amount as exceeds the 2-percent portion shall be paid at a rate equal to 45 percent of the annual rate provided by subsection (a).

For purposes of this subsection, the amount of any deficiency which is prorated to

installments payable under section 6166 shall be treated as an amount of tax payable in installments under such section.

(2) 2-Percent portion.-For purposes of this subsection, the term "2-percent portion" means the lesser of-

(A)(i) the amount of the tentative tax which would be determined under the rate schedule set forth in section 2001(c) if the amount with respect to which such tentative tax is to be computed were the sum of SI,000,000 and the applicable exclusion amount in effect under section 2010(c). reduced by

(ii) the applicable credit amount in effect under section 2010(c), or

(B) the amount of the tax imposed by chapter 11 which is extended as provided in section 6166.

(3) Inflation adjustment.-In the case of estates of decedents dying in a calendar year after 1998, the $1,000,000 amount contained in paragraph (2)(A) shall be increased by an amount equal to-

(A) $1,000,000, multiplied by
(B) the cost-of-living adjustment determined under section 1(f)(3) for such calendar year by substituting "calendar year 1997" for "calendar year 1992" in subparagraph (B) thereof.

If any amount as adjusted under the preceding sentence is not a multiple of $10,000, such amount shall be rounded to the next lowest multiple of $10,000.

(4) Treatment of payments.-If the amount of tax imposed by chapter 11 which is extended as provided in section 6166 exceeds the 2-percent portion, any payment of a portion of such amount shall, for purposes of computing interest for periods after such payment, be treated as reducing the 2-percent portion by an amount which bears the same ratio to the amount of such payment as the amount of the 2-percent portion (determined without regard to this paragraph) bears to the amount of the tax which is extended as provided in section 6166.

(k) No interest on certain adjustments.-

For provisions prohibiting interest on certain adjustments in tax, see section 6205(a).

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No. 07-1049

In the Supreme Court of the United States

LAROSA'S INTERNATIONAL FUEL CO., INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether interest accrued on petitioners' tax liabilities under 26 U.S.C. 6601, after the Internal Revenue Service levied upon petitioners' assets, where the levied assets were not applied to petitioners' tax obligations, but were instead placed in escrow pending judicial resolution of petitioners' tax liabilities.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-22) is reported at 499 F.3d 1324. The opinion of the Court of Federal Claims (Pet. App. 23-28) is reported at 56 Fed. Cl. 102.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2007. A petition for rehearing was denied on November 15, 2007 (Pet. App. 1). The petition for a writ of certiorari was filed on February 13, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner LaRosa's International Fuel Co., Inc. (LaRosa's International), is a Maryland corporation in the business of supplying coal to utility companies. Pet. App. 7. Petitioner Joseph LaRosa is a shareholder of LaRosa's International and his brother, Dominick LaRosa, who is not a party to this litigation, is its president. *Ibid.* In December 1985, the Internal Revenue Service (IRS) made jeopardy assessments against petitioners and Dominick LaRosa (collectively the LaRosas), totaling more than $21 million in taxes, penalties, and interest for the tax years 1981 through 1983. *Ibid.* Immediately thereafter, the IRS served notices of levy under Section 6331 of the Internal Revenue Code, 26 U.S.C. 6331 (1982), on financial institutions holding property belonging to the LaRosas. *Ibid.*

In December 1985 and early January 1986, two payments were remitted to the IRS, in the amounts of $169,955 and $114,098. Those amounts were applied to Joseph LaRosa's tax liabilities and LaRosa's International's tax liabilities, respectively. Pet. App. 8. Before additional assets were collected, liquidated, and applied to the LaRosas' outstanding tax liabilities, however, the IRS consented, as an accommodation to the LaRosas, to enter into an escrow agreement in lieu of applying the levied assets against their tax assessments. Gov't C.A. Br. 5-6; Pet. App. 8.

The escrow agreement, executed in January 1986, provided for the LaRosas' property to be held in escrow pending final judicial resolution of the LaRosas' tax liabilities. Pet. App. 8, 16-17, 25. The escrow agreement stated that "[t]his agreement is entered into solely for the purpose of securing the payment of the taxpayers' tax liability and is not to be considered as payment of

such liability." *Id.* at 20. The agreement provided that all monies deposited under the escrow agreement would be invested in certificates of deposit at a federally insured bank or savings and loan, and it further provided that interest would "accrue to the benefit of [petitioners]" and would be "taxable to them." *Id.* at 16-17. Under the agreement, the IRS could not apply any of the escrowed funds to any tax liabilities without consent or until final determination of those liabilities by a court. *Ibid.* Disbursements from the escrowed funds, however, could be, and were, made to the taxpayers to cover certain personal and business expenses. *Id.* at 17 n.5.

After execution of the escrow agreement, the IRS issued notices of deficiency to the LaRosas, reflecting the tax liabilities that were the subject of the jeopardy assessments, and the LaRosas filed petitions challenging the deficiency determinations in the United States Tax Court. Pet. App. 8.[1] In 1991, the IRS and the LaRosas reached an agreement to settle all the Tax Court litigation. *Ibid.* The stipulated decision in Joseph LaRosa's case determined that he was liable for deficiencies and additions to tax totaling approximately $2.3 million. *Ibid.* The stipulated decision in LaRosa's International's case determined that it was liable for deficiencies and additions to taxes totaling approximately $316,000. *Ibid.* The stipulated decisions reserved the LaRosas' rights to pursue an action contesting the amount of interest claimed by the IRS to be due on the agreed deficiency in tax. *Id.* at 9. The LaRosas paid the stipulated deficiencies out of funds other than the funds held in escrow. *Id.* at 8. The IRS then re-

[1] The LaRosas also attempted, unsuccessfully, to set aside the jeopardy assessments in federal district court. See *LaRosa* v. *United States*, 841 F.2d 544 (4th Cir. 1988).

leased the levies and the escrowed assets, together with the interest that had been earned thereon. *Id.* at 9, 25.

In 1993, the LaRosas filed claims for refund with the IRS claiming that they had made excessive interest payments on their settled tax liabilities. Pet. App. 9. They contended that interest should not have accrued against them on those liabilities after December 1985, when the IRS made its jeopardy assessments and served notices of levy, because, they claimed, after that time the IRS had actual or constructive possession of assets in excess of their tax liabilities. *Ibid.* The LaRosas argued that the IRS should have credited the full value of the assets held in escrow against their tax assessments, thereby suspending accrual of underpayment interest, as of 1985. *Ibid.* The IRS denied the refund claims, and suits for refund followed. *Id.* at 9-11 & n.3.

Dominick LaRosa litigated his refund claim in the United States District Court for the District of Maryland as a counterclaim in a suit the government had brought against him to recover an erroneous refund. Pet. App. 11 n.3; see *United States* v. *LaRosa*, 993 F. Supp. 907, 912-913 (D. Md. 1997), aff'd, No. 97-2782, 1998 WL 393976 (4th Cir. July 10, 1998) (unpublished), cert. denied, 526 U.S. 1004 (1999) (*LaRosa I*). The district court rejected Dominick LaRosa's argument that he was entitled to a refund of underpayment interest. The court held that, because the levied assets were placed in escrow rather than applied to satisfy the outstanding tax liabilities, the IRS was relieved of the duty it ordinarily would have had to promptly liquidate non-cash assets and apply the proceeds along with the seized funds to pay the tax. *LaRosa I*, 993 F. Supp. at 916-917. The Fourth Circuit affirmed, adopting the reasoning of the district court. *LaRosa I*, 1998 WL 393976.

2. Petitioners LaRosa's International and Joseph LaRosa litigated their refund claims in the Court of Federal Claims, where their cases were consolidated. Pet. App. 9 & 10 n.2. On cross-motions for summary judgment, the court held that petitioners were not entitled to the refunds they sought and granted partial summary judgment in favor of the government. *Id.* at 23-28.[2] The court concluded that the service of notices of levy and the subsequent placement of the funds at issue in escrow could not be characterized as payment of petitioners' tax liabilities. *Id.* at 10, 27-28. The court explained that, in *Rosenman* v. *United States*, 323 U.S. 658 (1945), this Court held that "tax payment occurs when the IRS actually applies funds to a particular tax liability; it is not enough to place funds into a 'suspense' account, or escrow, which merely functions as a surety against the future payment of said liability." Pet. App. 27 (quoting *Rosenman*, 323 U.S. at 662).

3. The court of appeals affirmed. Pet. App. 2-22. The court of appeals held that neither the levy nor the placing of funds in escrow could be treated as a payment that would stop the accrual of underpayment interest on petitioners' outstanding liabilities. *Id.* at 13. The court explained that a levy is a provisional remedy that "merely bring[s] the property into the Service's legal custody," rather than transferring ownership of the property to the IRS, and is not equivalent to payment of tax liabilities. *Id.* at 14 (quoting *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 210-211 (1983)). The court thus concluded that the IRS's levy against petitioners

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[2] The Court of Federal Claims ruled for petitioners on the government's counterclaim, which asserted that petitioners owed additional interest on unpaid taxes. See Pet. App. 6-7 & n.1. The government did not appeal from that decision.

did not stop the accrual of interest under 26 U.S.C. 6601(a). Pet. App. 16.

The court of appeals further held that no payment had occurred when petitioners' assets were placed in escrow because the agreement clearly stated that the escrow arrangement did not constitute the payment of taxes, but rather was only a security arrangement. Pet. App. 16-20.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. The court of appeals correctly held that petitioners had not made an overpayment of deficiency interest with respect to their tax liabilities and, consequently, were not entitled to their claimed refunds.

Under Section 6601 of the Internal Revenue Code, interest on a tax underpayment accrues "from the time the tax was due to be paid until the date the tax is paid. 26 U.S.C. 6601(a). As the court of appeals correctly concluded (Pet. App. 11-21), petitioners' tax liabilities were not paid for purposes of that provision when the IRS levied upon petitioners' assets, because the IRS did not apply the levied assets to petitioners' taxes; rather, at petitioners' request, the IRS placed the levied assets in escrow, with an express agreement that the placing of the assets in escrow was "not to be considered as payment of such [tax] liability." *Id.* at 20. Under the terms of the escrow agreement, the IRS was prohibited from applying any of the escrowed assets to the asserted deficiencies in petitioners' income taxes until there was a final judicial determination of petitioners' tax liabilities.

The cash assets were placed in interest-bearing accounts for petitioners' benefit, and petitioners received distributions from the escrow account to pay for certain living and business expenses. *Id.* at 16-17 & n.5.

2. Petitioners incorrectly contend (Pet. i, 14-15) that the decision below conflicts with this Court's decision in *United States* v. *National Bank of Commerce*, 472 U.S. 713 (1985), and is inconsistent with the rationale of its decision in *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198 (1983). According to petitioners, those cases establish that, once the IRS has levied upon a taxpayer's assets, "the taxpayer is entitled to the benefit of having the value of the levied property applied against the balance of the tax assessment"—at least where the assets in question are cash or cash equivalents. Pet. 14; see Pet. 15. Petitioners' contention glosses over the fact that, as an accommodation to them, the IRS agreed that the assets would be held in escrow instead of being applied against the balance of their tax assessment. The court of appeals' decision to give effect to the escrow agreement is wholly consistent with this Court's cases.

a. Contrary to petitioners' characterization (Pet. 14), this Court's decision in *National Bank of Commerce* does not "squarely address[] the issues involved" in this case. *National Bank of Commerce* addresses a very different question from the one presented here: Whether a bank may decline to honor an IRS levy on a joint bank account on the ground that the bank is uncertain how much of the funds in the levied account belong to the taxpayer as opposed to co-depositors, when the taxpayer has an absolute right to withdraw funds from the account. 472 U.S. at 714-715, 724. The Court answered that question in the negative. *Id.* at 724. In setting out the statutory background of the case, the Court de-

scribed an IRS levy as "creat[ing] a custodial relationship between the person holding the property and the IRS so that the property comes into the constructive possession of the Government." *Id.* at 720. But contrary to petitioners' suggestion (Pet. 14-15), the Court did not suggest, much less hold, that seizure of the levied property, *ipso facto*, constitutes *payment* of taxes owed. On the contrary, the Court recognized that a levy is only a "provisional remedy" that "does not purport to determine any rights to the property," but rather "protects the Government's interests so that rights to the property may be determined in a postseizure proceeding." 472 U.S. at 731 n.15; see *id.* at 721, 731. The court of appeals' decision is consistent with that recognition.

b. Nor is the decision below inconsistent with the rationale of *Whiting Pools*. In that case, this Court held that equipment and other tangible property the IRS had levied upon prior to the filing of the debtor's bankruptcy petition was property of the bankruptcy estate, and that the IRS was therefore required to turn the levied property over to the estate under Section 542(a) of the Bankruptcy Code (11 U.S.C.). *Whiting Pools*, 462 U.S. at 200, 211-212. The Court explained that a levy is a "provisional remedy" that merely brings property into the IRS's legal custody, and that the Internal Revenue Code does not transfer ownership of such property until the property is sold to a bona fide purchaser at a tax sale. *Id.* at 210-211.

Petitioner contends that the "express language" of *Whiting Pools* "strictly limit[s] [its] holding" to the proposition "that a levy on *nonliquid* assets only results in a delay in crediting the levied nonliquid proceeds to the tax accounts." Pet. i (emphasis added). Petitioner argues that the court of appeals in this case thus erred

in citing *Whiting Pools* for the proposition that levies on *liquid* assets do not themselves effectuate payments of tax liability. *Ibid.*; see Pet. App. 14-15.

Although the levied property at issue in *Whiting Pools* was nonliquid property, no "express language" in that opinion draws the distinction between levies on liquid assets and levies on nonliquid assets that petitioners now urge. And in any event, even if it were appropriate to draw such a distinction in determining whether the IRS must turn over levied assets under Section 542(a) of the Bankruptcy Code, see Pet. 16-17 (discussing *United States* v. *Borock* (*In re Ruggeri Elec. Contracting, Inc.*), 185 B.R. 750 (Bankr. E.D. Mich. 1995)), the court of appeals correctly held that there is no basis for drawing such a distinction in determining whether tax has been paid for purposes of Section 6601(a) of the Internal Revenue Code. Pet. App. 15-16. Although the IRS ordinarily does apply levied assets against the taxpayer's tax liability, see 26 U.S.C. 6342(a)(2), a levy does not in and of itself result in the collection of taxes owed—even where the levied assets are cash or cash equivalents. See Pet. App. 15-16 (citing *Stead* v. *United States*, 419 F.3d 944, 947-948 (9th Cir. 2005)). The IRS may instead agree, as it did here, to refrain from applying seized assets to asserted tax deficiencies pending final determination of the taxpayer's liability. Cf. *LaRosa I*, 993 F. Supp. at 916. The rationale of *Whiting Pools* casts no doubt on the court of appeals' decision in this case.

3. Petitioners claim (Pet. 17-21) that the court of appeals' reliance on the escrow agreement conflicts with the Tax Court's unpublished memorandum in *Stone* v. *Commissioner*, T.C. No. 5311-72 (Mar. 30, 1987). The claimed conflict does not warrant this Court's review, see Sup. Ct. R. 10, and is in any event illusory.

In *Stone*, the Tax Court held that interest on tax liabilities stopped accruing as of the date that the IRS levied on bank accounts and an escrow account, even though the IRS did not receive the funds until much later, because, following the levy, the IRS had constructive possession of the assets and could have demanded payment at any time. *Stone*, *supra*, slip op. at 4-5. As the court of appeals correctly noted, *Stone* "does not help" petitioners for two reasons: First, the Tax Court's decision rested in part on the government's stipulation that interest ceased to run as of the date that the government had constructive possession of the bank account and escrow accounts, and no such stipulation has been made here. Pet. App. 21. Second, and more important, in this case the parties' escrow agreement prevented the IRS from requiring that the assets be delivered to it, and made clear that the placement of monies in the escrow account did not constitute the payment of petitioners' tax liabilities. *Ibid.*

4. Petitioners' assertion that the decision below conflicts with the Fourth Circuit's decision in *United States* v. *Barlow's, Inc.* (*In re Barlow's, Inc.*), 767 F.2d 1098 (1985) (per curiam), is also without merit. *Barlow's* does not hold that "the service of a levy on liquid assets * * * , without more, reduces the levied asset to the dominion and control of the Internal Revenue Service." Pet. 22. Rather, in *Barlow's*, the "IRS went well beyond a mere service of levy," by entering into a payment agreement with the third party against whom the levy had been served "without plaintiff's participation." *Barlows, Inc.* v. *United States (In re Barlows, Inc.)*, 36 B.R. 826, 829 (Bankr. E.D. Va.), aff'd, 53 B.R. 986 (E.D. Va. 1984), aff'd, 767 F.2d 1098 (4th Cir. 1985). The third party subsequently defaulted on its obligations under

that payment agreement, with the result that the IRS's unilateral action in entering into that payment agreement caused the loss of funds that could have satisfied the tax liabilities.

In any event, the Fourth Circuit rejected much the same arguments that petitioners here advance in affirming the decision of the district court in Dominick LaRosa's case. See *LaRosa I*, 1998 WL 393976. That decision demonstrates that there is no disagreement between the Fourth Circuit and the Federal Circuit with respect to the question presented here.

5. Finally, petitioners contend (Pet. 21, 22-23) that they are not only entitled to a refund of the underpayment interest that accrued before their taxes were paid, but also to *overpayment* interest under 26 U.S.C. 6611(a), to the extent that such interest exceeds the interest that their funds earned while in escrow. See Pet. 21 (citing *Berger* v. *United States*, 85-1 U.S. Tax. Cas. (CCH) ¶ 13,618 (S.D.N.Y. 1985)). Petitioners' argument rests on the mistaken premise that their taxes were paid as of the date that the IRS levied upon their assets, and, as such, does not merit this Court's review.

6. This Court has previously declined to review Dominick LaRosa's challenge to the same set of transactions here at issue. *LaRosa I*, 526 U.S. 1004. There is no reason for a different result in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2008

No. 07-1049

May 5 08

In The Supreme Court of the United States

JOSEPH LAROSA;
LAROSA'S INTERNATIONAL FUEL CO., INC.,

Petitioners,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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STATEMENT

The United States relies extensively on the case of *United States v. LaRosa*, 993 F. Supp 907; *aff'd*, No. 97-2782, 1998 WL 393976. In that case, the court ruled that Dominic LaRosa (who is not a party to the instant case but is the brother of Joseph LaRosa) was obligated to repay a refund of interest received pursuant to a claim for refund which had been filed with the Internal Revenue Service related to a different aspect of the same levy. The parties to the instant case were not involved in that case.

The distinguishing factor between *U.S. v. LaRosa* and the instant case is that in the case involving Dominic LaRosa, the claim included interest accrued on nonliquid assets. The instant case is expressly confined to credit for the interest which accrued on the liquid assets subject to the levies by the Internal Revenue Service, an amount in excess of $10 million.

If the rationale of the decisions in the case involving Dominic LaRosa had been the deciding factor on the issue of whether the Petitioners in the instant case were entitled to interest on the levied and escrowed funds, the courts below would not have needed to take the trouble to analyze entitlement to interest under the other theories. The courts below in the instant case recognized that confining the claim to interest accrued on liquid assets is a distinguishing fact which makes the instant case subject to its own separate rationale.

The Opposition of the United States misconstrues *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983). The language in the Opposition on page 5 taken from *Whiting Pools* to the effect that the service of levies by the Internal Revenue Service is a so-called "provisional remedy" applies only to nonliquid assets. As discussed in the Petition for Writ of Certiorari, *Whiting Pools* and its progeny universally limit the delay of credit of the levied assets toward taxes to nonliquid assets such as furniture and equipment. A levy on nonliquid assets does not reduce those nonliquid assets to the immediate dominion and control of the Internal Revenue Service, under the rationale of *Whiting Pools* and the cases decided thereafter, until those assets are sold in satisfaction of the levy[1]. In this respect, the Opinion of the Court of Appeals for the Federal Circuit in the instant case is in conflict with *Whiting Pools* and with every other decision based on the *Whiting Pools* holding.

As discussed at length in the Petition for Writ of Certiorari, the case of *Rosenman v. United States*, 323 U.S. 658 (1945) does not involve a similar factual situation, nor is its holding applicable here. As noted in the Petition, the United States Court of Federal Claims has since distinguished *Rosenman*, as applied to the situation in the instant case. *Joan*

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[1] This stands to reason because, among other factors, the value of the nonliquid assets cannot be determined until they are sold, and in a situation involving the quasi-judicial sale of nonliquid assets, the titleholder can object to aspects of the sale, or even file bankruptcy to stop the sale, as in the *Whiting Pools* case.

Huskins, Personal Rep. of the Estate of Phillip Goldstein v. U.S., 75 Fed. Cl. 659; 99 AFRT 2d 2007-1728 (2007).

Rosenman does not apply to the instant situation primarily because the remittance in *Rosenman* was voluntary. In *Rosenman*, the taxpayer sent in a voluntary remittance which was held in suspense by the Internal Revenue Service pending the assessment of tax on a return, where the return was not filed until after the remittance. In the instant case, the Internal Revenue Service perfected a levy against the Petitioners' funds on the basis of a jeopardy assessment. In the instant case, the assessment predated the levy of funds. A more involuntary payment cannot be imagined. The Internal Revenue Service agreed to the LaRosas' escrow arrangement because the United States District Court, in response to the challenge to the jeopardy assessment, ordered that the levied funds be held in place and not be liquidated until the final decision was rendered on the legality of the underlying jeopardy assessment.

Under the rationale of the case of *United States v. National Bank of Commerce*, 472 U.S. 713 (1985), the service of the notice of levy places the levied liquid asset within the dominion and control of the Internal Revenue Service, and the levied funds are thereby considered a payment of the tax. Any subsequent disposition of the funds by the Internal Revenue Service does not eliminate entitlement of the levied taxpayer to interest on the levied funds. Otherwise, the Internal Revenue Service would be able to tie up the taxpayer's funds, as they did in

this case to the tune of in excess of $10 million of liquid assets, indefinitely without compensating the taxpayer under § 6601. Clearly, this is not what Congress intended when it provided for interest on overpayments. It might have been a different matter if the parties had entered into the escrow arrangement prior to the service of the levy notice. Under the holding in *National Bank of Commerce*, once the Internal Revenue Service perfects a levy, it must credit the taxpayer with the levied funds.

The two cases which involve escrow deposits or delayed payments after a levy, *Stone v. Commissioner*, United States Tax Court Memorandum Sur Order, U.S. Tax Court Docket No. 5311-72 (March 30, 1987) and *Berger et al. Ex'r of the Estate of Goldfarb v. U.S.*, 85-1 USTC ¶ 13,618; 56 AFTR 2d 85-6505 (S.D. NY 1985) both hold that the taxpayer is entitled to interest on the escrowed or delayed funds under 26 U.S.C. § 6601. The case of *Stead v. U.S.*, 419 F.3d 944 (9th Cir. 2005) does not contradict the holdings in *Stone* or *Estate of Goldfarb*, because the *Stead* case was decided after the effective date of the Taxpayer Bill of Rights, 26 U.S.C. § 6332(c). The Taxpayer Bill of Rights imposes a delay of 21 days between the date of the service of a levy notice by the Internal Revenue Service and the date on which the funds are turned over to the Internal Revenue Service by the custodian. During this period of time, the levy is subject to challenge by the taxpayer so it is not final, unlike the levy in *National Bank of Commerce* as well as the levy in the instant case. These levies predated the Taxpayer Bill of Rights and the levies became final when served.

The escrow agreement language does not state anywhere that the LaRosas are waiving entitlement to interest from the Internal Revenue Service by placing the levied funds into the escrow account. The escrow agreement language also preserves the jurisdiction of the United States Tax Court over the alleged deficiency assessed against the LaRosas. The Tax Court loses jurisdiction to redetermine a deficiency in tax once the tax has been paid and the deficiency no longer exists[2]. The language in the escrow agreement does not waive the taxpayer's claims for interest and it should not be interpreted against the taxpayers in a situation where their funds were deposited into the escrow only after levies were served by the Internal Revenue Service. Under the law in effect then, these levies became effective to reduce the funds to the dominion and control of the Internal Revenue Service on the date when the levies were served. Moreover, the Internal Revenue Service could have insisted on a provision in the escrow agreement that the escrowed funds would not bear interest chargeable against the United States, but no such provision appears in the document.

In the case of *Stone v. Commissioner*, United States Tax Court Memorandum Sur Order, U.S. Tax Court Docket No. 5311-72 (March 30, 1987), a copy of which was attached to the Petition for Writ of

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[2] The LaRosas were issued Notices of Deficiency after the escrow was established, and they challenged the deficiencies in the United States Tax Court, which resulted in a settlement reducing the assessment from in excess of $20 million to almost $3.5 million.

Certiorari, the Internal Revenue Service correctly stipulated that the taxpayers were entitled to interest on funds which were being held in the taxpayers' bank account pending final decision of the Tax Court. This stipulation does not distinguish the *Stone* holding from the situation in the instant case. The basis for this stipulation does not appear in the Memorandum Sur Order, and so it has little precedential value. If anything, this stipulation supports the Petitioners' contention that interest is due and payable by the Internal Revenue Service on the levied, escrowed funds; the Internal Revenue Service is merely taking a contrary position in the instant case.

It is hard to see how the facts in the *Stone* case are materially different from the escrow agreement in the instant case. Both agreements delayed the ultimate transfer of the funds to the Internal Revenue Service. The fact that the escrow agreement in the instant case contained a provision that funding the escrow did not result in a payment of tax does not distinguish the escrow agreement in the instant case from the one in *Stone*. The taxes in the instant case were paid under 26 U.S.C. § 6601 once funds equal to or in excess of the tax assessment, as finally determined, were levied. There are absolutely no cases or other precedent which holds that the escrow by the Internal Revenue Service of a taxpayer's funds, after the service of a levy notice becomes final, eliminates the taxpayer's entitlement to interest on any levied funds.

In *Barlows, Inc. v. United States*, 36 B.R. 826 (Bankr E.D. Va.), *aff'd*, 53 B.R. 986 (E.D. Va. 1984),

aff'd, 767 F.2d 1098 (4th Cir. 1985), the taxpayer was credited with funds levied by the Internal Revenue Service upon service of the levy notice. The subsequent events, i.e. the failure of the levied company to remit payments to the Internal Revenue Service, were held not to be relevant to whether the taxpayer became entitled to credit against tax for the levied funds immediately upon service of the levy notice. The taxpayer in *Barlows* was given immediate credit by the Circuit Court for the entire balance of the levy proceeds which the Internal Revenue Service could have collected, even though the total levied amount was never, in fact, actually collected. In that respect, the decisions below in the instant case conflict with this Circuit Court decision.

The fact that this Court denied certiorari in the case involving the other LaRosas is not relevant to the instant case was because that other case involved levies on non-liquid assets which were not subsequently liquidated, but instead were placed into escrow. As discussed at length, levies on non-liquid assets do not give rise to interest under § 6601, whereas levies on liquid assets, during the time period involved in this case, give rise to an immediate right to recover interest.

CONCLUSION

The Petitioners respectfully submit that it is appropriate to grant certiorari in this case, and that in doing so, this Court can clarify the entitlement of a significant number of taxpayers to interest on levied funds, as well as resolving conflicts with this Court's own opinions and among the circuits.

Respectfully submitted,

/s/

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